

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-37

COVERT MARINE, INC., et al.,
Petitioners,

vs.

OUTBOARD MARINE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

The Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on April 12, 1979.

JURISDICTION

Jurisdiction to review the judgment below by Writ of Certiorari is conferred by Rule 19(6) of the Supreme Court: The United States Court of Appeals For The Seventh Circuit " * * * has decided a federal question in a way in conflict with applicable decisions of this Court * * *."

The judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was dated April 12, 1979, and the time of its entry was April 12, 1979.

QUESTION PRESENTED

Can a Consent Judgment entered in a case that was never tried and in which there were not any findings of fact nor conclusions of law confer immunity on the defendant from civil liability for future violations of the Federal Anti-Trust Laws under the Doctrine of Res Judicata?

STATUTES INVOLVED

The statutory provisions involved in this appeal are found in 15 U.S.C. Sections 1, 2, 15 and 26 (Supp. V, 1975), the pertinent parts of which are as follows:

Section 1. "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal * * *."

Section 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 15. "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee * * *."

Section 26. "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff."

STATEMENT OF THE CASE

This is a private antitrust action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26 to prevent and restrain violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Petitioner-Wholesalers are, and long have been, distributors of Respondent Outboard Marine Corporation's ("OMC") marine replacement parts and marine accessories. Petitioner-Retailers are retail marine dealers

who have engaged in the business of purchasing replacement parts for Johnson and Evinrude outboard motors from independent wholesale distributors.

Respondent Outboard Marine Corporation (hereafter called "OMC") is and for many years past has been, engaged in the business of manufacturing, distributing and selling marine products in interstate commerce throughout the United States. The marine products manufactured, distributed and sold by OMC in interstate commerce include outboard motors which are and always have been its principal product. OMC markets its marine products under various trademarks and trade names, including the trade names "Johnson" and "Evinrude." OMC is, and for many years past has been, engaged in the business of manufacturing, distributing and selling replacement parts and marine accessories for its outboard motors in interstate commerce. Such replacement parts and marine accessories are marketed by OMC under the trade names "Johnson," "Evinrude" and "OMC." OMC did sell to the independent wholesale distributors, including Petitioners, located in the United States east of the Rockies area a full line of the replacement parts needed to repair and service Johnson and Evinrude outboard motors until September 30, 1978, at which time it refused to deal thereafter with any independent wholesale distributor.

OMC has been and remains the world's largest manufacturer of outboard motors.

In the past ten (10) years, OMC has manufactured and sold over \$2-1/2 billion worth of marine products, replacement parts and marine accessories.

Mercury and Chrysler are the only manufacturers other than OMC that market outboard motors in a full line of horsepower ratings.

The Evinrude and Johnson divisions of OMC sell outboard motors under their respective brands to separate dealer organizations, each of which consists of approximately 3,000 franchised dealers.

OMC is the only manufacturer of ninety-nine percent (99%) of replacement parts needed to repair and service the Johnson and Evinrude outboard motors manufactured by it.

Persons other than Johnson dealers and Evinrude dealers, such as independent marine repair shops, marinas, yacht houses and dealers in outboard motors manufactured by persons other than OMC, also are engaged in the business of repairing and servicing outboard motors, and must have access to replacement parts for outboard motors to remain viable.

Replacement parts and marine accessories for outboard motors manufactured by OMC were until September 30, 1978, and for many years past have been, distributed through independent wholesale replacement parts distributors. Independent wholesale replacement parts distributors purchased such replacement parts and marine accessories from OMC. Independent wholesale replacement parts distributors sold such replacement parts and marine accessories to such retail dealers in competition with OMC since 1967.

On or about May 7, 1971, OMC publicly announced a program under which it would cease to sell OMC replacement parts and marine accessories to independent wholesale distributors and would expand its own wholesale distribution system for replacement parts and marine accessories in the United States east of the Rockies area. OMC sent a letter on or about May 7, 1971, to all independent wholesale distributors in the United States east of the

Rockies area, then numbering fourteen (14), stating to each distributor that it would not enter into an agreement with that distributor for any term extending beyond a certain date set forth in that letter.

The present Petitioner-Wholesalers did in 1971 sue the Respondent OMC to enjoin their termination as OMC Parts Distributors, which suit was settled without trial and without findings of facts or conclusions of law. Accordingly, a Consent Judgment was entered in 1972 extending the Petitioner-Wholesalers' Distributorship Contracts for six (6) years to September 30, 1978. (See Appendix 5)

By letters in September, October and November of 1976 Respondent OMC notified all retail dealers that after September 30, 1978 it would refuse to sell OMC replacement parts to any independent wholesale distributors, including Petitioners, and that thereafter retail dealers would be required to purchase OMC replacement parts from co-conspirator depots and co-conspirator depots to be created in the future.

This action was commenced on February 2, 1977 in the Federal District Court, Western District of Missouri; the Respondent filed a Motion to Dismiss.

On June 13, 1978, the Federal District Court, Western District of Missouri, transferred this matter to the United States District Court for the Northern District of Indiana, Fort Wayne Division. No pre-trial discovery has been had in this matter.

Petitioners moved for preliminary injunctive relief on May 31, 1978. That motion requested that the Court order OMC, pendente lite:

(1) to continue to sell replacement parts and marine accessories to Petitioner-Wholesalers;

(2) to continue to deal with Petitioner-Wholesalers in accordance with the course of dealings established between OMC and Petitioners in past years;

(3) not to refuse to sell replacement parts and marine accessories to Petitioner-Wholesalers; and

(4) not to terminate Petitioners as wholesale distributors of replacement parts and marine accessories pursuant to the announcements of September, October and November of 1976, or any subsequent announcement, or any provision for termination in the existing distributor agreements between OMC and Petitioners or any distributor agreement entered into between OMC and any Petitioner during the pendency of this action.

Petitioners in their request for preliminary injunction did not request that Respondent OMC be inhibited from expanding its own distribution system for replacement parts and marine accessories.

The question presented was whether a preliminary injunction should issue permitting Petitioner-Wholesalers to continue in their businesses until this action was tried and a final decision rendered by the Court.

A hearing was held, briefs submitted and on the 25th day of September, 1978, the District Court denied the Motion For Preliminary Injunction, holding that Petitioner-Wholesalers were barred from proceeding in this action by the doctrine of Res Judicata based upon the Consent Judgment entered in the previous action between Petitioner-Wholesalers and Respondent-OMC. Upon appeal to the United States Court of Appeals for the Seventh Circuit, the District Court's Judgment of Res Judicata was affirmed.

RESPONDENT-OMC'S POSITION IN OUTBOARD MARINE INDUSTRY

The outboard marine industry consists of three tiers:

1. Manufacturing,
2. Wholesale Distribution, and
3. Retail dealers who serve the consuming boating public.

The primary product which is the subject of the outboard motor industry is outboard motors.

There exists an "after market" in the outboard motor industry. The "after market" in the outboard motor industry consists of replacement parts and marine accessories.

The difference between a marine accessory and a replacement part is that the part is necessary in the operation of the motor and an accessory is not necessary in the operation of the motor.

Respondent-OMC's position in the outboard motor industry is and has been since 1930 the world's largest manufacturer of outboard motors having a market share ranging from 50% to 67% and directly markets its products as Johnson Outboard Motors and Evinrude Outboard Motors to retail dealers.

There are approximately 20,000 service replacement parts for Johnson and Evinrude Outboard Motors and OMC is the only source of 99% of replacement parts for Johnson and Evinrude Outboard Motors.

There are approximately 12,000 marine dealers in the United States, of which 6,500 are either Johnson or Evinrude Outboard Motor dealers and all 12,000 dealers must

have access to replacement parts for Johnson and Evinrude Outboard Motors because that service is vital to a viable dealership.

From 1927 to 1966 OMC exclusively marketed and distributed its replacement parts and marine accessories through independent wholesale distributors who in turn sold to retail dealers. Beginning in 1967 the Respondent began establishing wholly owned corporate subsidiaries which are wholesale distributors of OMC replacement parts and marine accessories and are referred to herein as "depots". Thus the Respondent established a dual wholesale distribution system, which continued to exist until September 30, 1978, although the independent wholesale distribution system had given satisfactory service.

The marketing and distribution of replacement parts for Johnson and Evinrude Motors was a competitive market until September 30, 1978. The competition was in service level, pricing and promotion, cash discounts and rebates and credit terms and free freight and free telephone service.

Marine retail dealers also sell marine accessories to the public.

Marine accessories are high profit items.

OMC evidenced little interest in marine accessory items until 1970 when OMC decided to eliminate the independent wholesale distribution system in order to attain a monopoly in the wholesale distribution of OMC replacement parts and thereby to gain a competitive advantage in the marine accessory market. If OMC becomes the only source of replacement parts for Johnson and Evinrude Motors, the retail dealer will be pressured to buy marine accessories from OMC to protect his supply of replacement parts.

Prior to May 23, 1972 OMC did not market or sell marine accessories that it did not manufacture or private label. It was not until 1970 that OMC contemplated expanding entry into the marine accessory market by including marine accessories it neither manufactured nor private labeled. This was to be accomplished by taking over the complete distribution of its replacements parts.

Subsequent to the aforesaid May 23, 1972 Consent Judgment, the Respondent and the then existing co-conspirator depots were joined by additional co-conspirator depots and the Respondent and the co-conspirator depots did (1) enter the miscellaneous marine accessory market in the fall of 1973; (2) Respondent did use the May 23, 1972 Consent Judgment as a device to carry out their plan to gain a competitive advantage in the miscellaneous accessories market; and (3) Respondent did use its monopoly power in OMC replacement parts as a means of inherent coercion to gain a competitive advantage in the sale of Non-OMC marine accessories to marine retail dealers. In this action the six (6) Petitioner-Wholesale Distributors were joined as party plaintiffs by twenty-one (21) Retailers, none of whom was a party to the aforesaid May 23, 1972 Consent Judgment.

At the time of the entry of the Consent Judgment, OMC did not market or sell Non-OMC marine accessories. OMC did not announce its entry into the Non-OMC marine accessory market until the fall of 1973.

In the fall of 1972, Respondent was aware that Petitioner-Wholesalers understood that the Consent Judgment of May 23, 1972 would not necessarily terminate their relationship with the Respondent after September 30, 1978. Respondent was aware that Petitioner-Wholesalers anticipated continuing their relationship with Respondent after

that date. Despite having been put on notice of Petitioner-Wholesalers' interpretation of the effect of the Consent Judgment, the Respondent took no steps to take issue with that interpretation and apparently accepted it. It was not until four (4) years later in the fall of 1976 that the Respondent attempted to make use of the Consent Judgment as a device for gaining a monopoly in the wholesale distribution of replacement parts and for gaining a competitive advantage in the marine accessory market.

APPLICABLE DECISION OF THIS COURT

The only applicable decision of this court is *Lawlor v. National Screen Service Corp.*, U.S. S. Ct., 1955, 349 U.S. 322, 75 S. Ct. 865.

The facts and holding in the *Lawlor*, supra, case are squarely applicable to the facts in the instant case and squarely in conflict with the Order of the United States Court of Appeals for the Seventh Circuit below.

Both the Court of Appeals and District Court for the Northern District of Indiana below made the same error here that the District Court and Court of Appeals made in the *Lawlor*, supra, case in that they confused course of conduct with cause of action.

In the *Lawlor*, supra, case the defendant was originally charged in a 1942 Complaint with having conspired "to establish a monopoly in the distribution of standard accessories by means of exclusive licenses."

In 1943 that suit was settled prior to trial by the entry of a Consent Judgment in which there were neither findings of fact nor conclusions of law. Pursuant to the settlement the suit was dismissed with prejudice by court order.

As part of the settlement plaintiff received a sub-license as distributor of standard accessories for three years until 1946 with the renewal then for five additional years.

In 1949 while the sub-license was still in effect plaintiffs again sued the same defendant alleging the same conspiracy to monopolize and alleging among other things that the settlement of the 1942 suit was merely a device used by the defendant in that case to perpetuate their conspiracy and monopoly.

This Court reversed the application by the District Court and Court of Appeals below of the Doctrine of Res Judicata because the acts being complained of were subsequent to the entry of the 1943 judgment and therefore it constituted a different cause of action. The Court further stated that such application would be contrary to enforcement of the anti-trust laws.

The facts of this case are strikingly similar.

The gravamen of the offense alleged is not as the Appellate Court and the District Court mistakenly assumed, the Respondent's refusal to extend Petitioner-Wholesalers' contracts, it is rather the refusal to sell to any independent wholesaler replacement parts in which Respondent has monopoly power in order to extend its leverage into an entirely different market, namely, marine accessories. Erroneously viewing the matter as a contracts case, the Courts below applied the Doctrine of Res Judicata. When viewed in its true light as a violation of the Federal Anti-Trust Laws as enunciated in the only applicable decision of this Court, *Lawlor*, supra, the Consent Judgment of May 23, 1972 could not confer immunity from a cause of action arising from Respondent's conduct culminating in a refusal to sell to any wholesaler after September 30, 1978.

In 1971 Petitioner-Wholesalers here filed a Complaint alleging a course of conduct by the Respondent in violation of Sections 1 and 2 of the Sherman Act, supra. A settlement was reached which became the subject of a Consent Judgment entered on May 23, 1972, which made neither findings of fact nor conclusions of law. Part of that settlement was an extension of Petitioner-Wholesalers' distribution contracts to September 30, 1978. On February 2, 1977, while their distributor contracts were still in effect, Petitioner-Wholesalers and Petitioner-Retailers brought this action complaining of conduct of Respondent subsequent to the May 23, 1972 Consent Judgment.

Petitioner-Wholesalers contend that even though the conduct subsequent to the May 23, 1972 Consent Judgment may have been part of the same course of conduct, under the decision of this court in *Lawlor*, supra, it was certainly not the same cause of action and therefore the Doctrine of Res Judicata cannot apply for as this court stated in *Lawlor*, supra:

"acceptance of [Court of Appeals] novel contention would in effect confer on [Respondent] a partial immunity from civil liability for future violations [of the anti-trust laws]." 349 U.S. at p. 329, 75 S.Ct. at 869.

If the District Court and the Court of Appeals misapplied the law as set forth in *Lawlor*, supra, such misapplication is an abuse of discretion, *Milsen Co. v. Southland Corp.*, (C.A. 7, 1971) 454 F.2d 363, and warrants this Court in reversing the United States Court of Appeals For The Seventh Circuit's affirmation of the District Court's denial of Petitioners' Application for Preliminary Injunction and ordering the entry of a preliminary injunction.

REASON FOR GRANTING THE WRIT

The order of the United States Court of Appeals for the Seventh Circuit entered on April 12, 1979, is in conflict with the decision of this court in *Lawlor v. National Screen Service Corporation*, 349 U.S. 322, 75 S. Ct. 865 (1955).

The purpose of the anti-trust laws is the protection of competition, not competitors, *Brown Shoe Co. v. United States*, (U.S. S. Ct., 1962) 370 U.S. 294, 344, 82 S. Ct. 1502, 1534, see also *Anti-Trust Procedures and Penalties Act*, 15 U.S.C. § 16(e):

"Public Interest Determination. (e) Before entering any Consent Judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. . . ."

In *Lawlor*, supra, this court clearly announced that policy in assessing the effect of a Consent Judgment in civil prosecutions under the anti-trust laws for conduct subsequent to the entry of the Consent Judgment. It is the refusal of Respondent to sell replacement parts to any independent wholesaler after September 30, 1978, that is complained of here. The previous Consent Judgment entered on May 23, 1972, cannot in effect confer immunity upon the Respondent from civil liability for a violation of the anti-trust laws and a cause of action arising subsequent to the entry of that Consent Judgment.

It is noteworthy that neither the District Court nor the Court of Appeals below addressed themselves to the basic question here: was the conduct complained of here subsequent to the entry of the Consent Judgment? The record below is clear and unequivocal and was corroborated

by the Respondent's own witnesses that the conduct complained of in this matter took place subsequent to the entry of the Consent Judgment. That being the case, it is a different cause of action and under the holding of this Court in *Lawlor*, supra, the Doctrine of Res Judicata cannot apply even though this cause of action may have been part of the same course of conduct.

CONCLUSION

The Writ of Certiorari should be granted to affirm the holding of this Court in *Lawlor v. National Screen Service Corporation*, 349 U.S. 322, 75 S. Ct. 865 (1955): That a Consent Judgment in a case that was never tried and in which there were not any findings of facts nor conclusions of law cannot confer immunity on a defendant from civil liability for future violations of the Federal Anti-Trust Laws under the Doctrine of Res Judicata.

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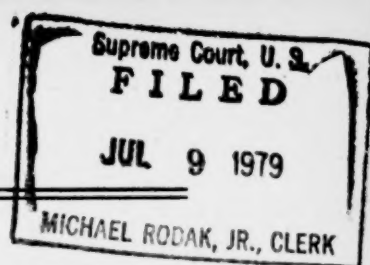
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Three copies of the foregoing Writ were mailed by
U.S. Mail, postage prepaid, on the 6th day of July, 1979,
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APPENDIX 1

OPINION

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(ARGUED APRIL 11, 1979)

APRIL 12, 1979

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. DUDLEY B. BONSAL, Senior District Judge*

No. 78-2325

COVERT MARINE, INC., et al.,

Plaintiffs-Appellants,

vs.

OUTBOARD MARINE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the

Northern District of Indiana, Fort Wayne

Division No. F 78-C-76

JESSE E. ESCHBACH, Judge.

***Senior District Judge Dudley B. Bonsal of the United States District Court for the Southern District of New York is sitting by designation.**

ORDER

The Court, having read the briefs, addressed itself to the record, heard oral argument on behalf of the appellants, and conferred at the bench, announced in open court that the judgment appealed from is AFFIRMED.

The district court concluded, after an evidentiary hearing, that neither the plaintiff-retailers nor the plaintiff-wholesalers had made the necessary showings to warrant the grant of a preliminary injunction, nor class certification. Because of the likelihood that the plaintiff-wholesalers will be barred by *res judicata*, and because of the failure of plaintiff-retailers to demonstrate irreparable harm (and the very serious question of their likelihood of success in any event), we agree. The findings were not clearly erroneous, nor has an abuse of discretion been shown.

Accordingly, the Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.

APPENDIX 2

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CIVIL NO. F 78-76

COVERT MARINE, INC., ET AL.,
Plaintiffs,

v.

OUTBOARD MARINE CORPORATION,
Defendant.

MEMORANDUM OF DECISION AND ORDER

This matter is before the court on two primary issues: (1) plaintiffs' motion for a preliminary injunction, filed May 31, 1978, in the United States District Court for the Western District of Missouri, Western Division (Civil Action No. 77-0082-CV-W-1, hereinafter, Covert II), and transferred to the United States District Court for the Northern District of Indiana, Fort Wayne Division, by the June 13, 1978, order of Chief Judge John W. Oliver; and (2) the propriety of the certification of a plaintiffs' class, retailers who are the purchasers of marine parts and accessories through independent wholesale distributors. A hearing was held August 17, 20, 21, 1978, for the presentation of evidence bearing on the above issues.

The Parties

Covert II plaintiffs, who move for this preliminary injunction, must be considered as two separate groups.

Plaintiff-distributors are six independent wholesale distributors of marine parts and accessories manufactured by defendant, Outboard Marine Corporation (OMC) and others. Plaintiff-dealers are 21 purchasers for retail resale of said parts and accessories. "Parts" refers to repair and replacement parts for Johnson, Evinrude and OMC sterndrive motors. "Accessories" refers to products such as boat windshields, anchors, life jackets, and water skis. Plaintiff-dealers seek to represent the class of all purchasers [at retail] of such parts and accessories.¹

Defendant OMC is a multidivisional, multinational corporation with its primary interest in marine propulsion. OMC is a manufacturer of Johnson and Evinrude outboard and OMC sterndrive motors, replacement parts for those motors, and a line of accessories (OMC accessories). OMC also markets accessories obtained from other manufacturers, some of which carry the OMC label (OMC accessories) and some of which carry the outside manufacturer's label (non-OMC accessories).

OMC presently has approximately a 50% share of the United States market in sales of outboard motors for boats. OMC expects that share to drop in the next year, however, as has their share of the world market, because of the influx of "excellent" Japanese outboard motors. OMC has a 20% market share in sterndrive engines. Except for "fast moving parts", principally tune-up parts, only OMC manufactures OMC-used replacement parts, i.e., OMC is the only manufacturer of approximately 90% of the replacement parts for its own motors. OMC has approximately a 2.6% share of the United States market in

1. There is some ambiguity in plaintiffs' complaint as to which named plaintiffs seek to represent the class of retailers. As will be shown below, neither plaintiff-distributors nor plaintiff-dealers are adequate representatives of the class.

accessories. (This includes their sales of both OMC and non-OMC accessories.)

I. Background

Approximately seven years ago, the six plaintiff-distributors commenced an action in this court against defendant OMC and a subsidiary (Civil Action No. 71-F-104, hereinafter, Covert I). The plaintiff-distributors then complained that their proposed replacement by OMC's direct distribution to retailers of replacement parts and accessories for OMC's outboard motors and other products, violated Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§1 and 2).

For some years, plaintiff-distributors had agreements with OMC that OMC should supply to the distributors and the distributors should sell at wholesale prices to retail dealers, OMC replacement parts and accessories. Such agreements were continued on a year to year basis until May 23, 1972, when just before trial and after extensive discovery and briefs with respect to a hearing on a motion for a preliminary injunction, the six plaintiff-distributors and OMC agreed to a compromise settlement and consented to the entry of a Final Judgment in Covert I. Under that Consent Judgment (drafted by the parties), the term of the OMC Parts and Accessories Distributor Agreement between each plaintiff-distributor and OMC was to be extended until September 30, 1978, when each such agreement was set to terminate with OMC having no further obligation to deal with any plaintiff-distributor.

However, plaintiffs feel that such termination will be injurious to their businesses and to the market in which they function. At present there exists a dual distribution system for OMC parts and accessories. The six plaintiff-distributors and one additional independent distributor

are located east of the Rockies. Five additional independent distributors are located in the West. There are now six OMC owned depots throughout the United States; four additional depots are scheduled to open October 1, 1978, at the termination of the parts and accessories agreements between OMC and the seven independent distributors east of the Rockies. Thus, after October 1, 1978, OMC would be the only distributor of OMC replacement parts and accessories east of the Rockies.

Plaintiffs contend that if the above events take place, the plaintiff-distributors' businesses will cease to exist;² the plaintiff-dealers and the class they seek to represent will no longer have a free marketplace in which to function but will be compelled to depend entirely upon OMC for their source of supply at whatever price and terms OMC sets and will have to accept whatever level of service OMC may provide. Plaintiffs contend that the competitive market now existing in OMC parts and accessories will be lost forever as the independent distributors will not be able to continue in business without an injunction and will not be able to reinstitute and restart their businesses in the event of ultimate victory in this lawsuit.

Plaintiffs allege in their complaint that OMC's intentions are in violation of the federal antitrust laws, in particular Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2.

Plaintiffs ask in their motion for preliminary injunction, that the court order OMC (1) to continue to sell parts and accessories to plaintiff-distributors; (2) to continue to deal with plaintiff-distributors in accordance with the course of dealings established between OMC and plaintiff-distributors in past years; (3) not to refuse to

2. There was, however, evidence to the contrary introduced at the hearing, most of it from plaintiffs' own witnesses.

sell parts and accessories to plaintiff-distributors; and, (4) not to terminate plaintiff-distributors as distributors of parts and accessories.

II. Plaintiff-dealers and Class Certification

The federal antitrust laws provide for five separate forms of enforcement: by the federal government for injunctive relief against antitrust violations, 15 U.S.C. §4; by the federal government in an action for damages for injury to governmental business or property, 15 U.S.C. §15a; by criminal actions brought by the federal government, 15 U.S.C. §§1 and 2; by private individuals seeking damages for violation of the antitrust laws, 15 U.S.C. §15; and by private individuals seeking to enjoin violations of the antitrust laws, 15 U.S.C. §26. Common to each provision for enforcement is the requirement that the defendants have conspired to fix prices, create a monopoly, or otherwise engage in prohibited activity. But the action for an injunction under §26 requires, in addition, that the plaintiff or plaintiffs make "a showing that the danger of irreparable loss or damage is immediate . . .," 15 U.S.C. §26.

This showing of immediate, irreparable loss or damage is by statute a prerequisite to the issuance of an injunction; it is by statute an element of plaintiffs' standing to sue. Cf. *Dafforn v. Rousseau Associates, Inc.*, [1977] TRADE REG. REP. (CCH ¶61,219 (N.D. Ind. filed July 27, 1976)).

Further, a plaintiff is entitled to injunctive relief "under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . ." 15 U.S.C. §26. A recent decision by the Court of Appeals for the Seventh Circuit concerning preliminary injunctions is *Fox Valley Harve-*

store, Inc. v. A. O. Smith Harvestore Products, Inc., 545 F.2d 1096 (7th Cir. 1976). The *Fox Valley* court described the extraordinary nature of a preliminary injunction in the following way:

The grant of a preliminary injunction is the exercise of an extremely far reaching power not to be indulged in except in a case warranting it A preliminary injunction is an extraordinary remedy which is not available unless the plaintiffs carry their burden of persuasion as to all of the prerequisites. 545 F.2d at 1097.

The prerequisites for issuance of a preliminary injunction, as enumerated by the Seventh Circuit were as follows:

(1) the plaintiffs have no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (2) the threatened injury to the plaintiffs outweighs the threatened harm the injunction may inflict on the defendant; (3) the plaintiffs have at least a reasonable likelihood of success on the merits; and (4) the granting of a preliminary injunction will not disserve the public interest. 545 F.2d at 1097.

The §26 statutory standing requirement of immediate, irreparable loss or damage has special importance within the context of a Rule 23 class action. It is elementary that to constitute a valid class, each member of the proposed class must be able to bring a suit upon claims presenting questions of fact or law common with those of the representative plaintiff. The root issue is whether each member of the proposed class is situated in such a position vis-a-vis plaintiff that each class member, like plaintiff, could bring the instant suit.

In this action plaintiffs allege that defendants have engaged in a combination and conspiracy in unreasonable

restraint of interstate trade and commerce in replacement parts for Johnson and Evinrude outboard motors in the United States east of the Rockies area in violation of Sections 1 and 2 of the Sherman Act. In addition, they allege that such combination in restraint of trade will be used by OMC to gain a competitive advantage in the manufacture, distribution and sale of marine accessories in the United States east of the Rockies. But while plaintiffs may have alleged violations of the antitrust laws, these allegations do not of their own force establish immediate, irreparable loss or damage. *Dafforn v. Rousseau Associates, Inc.*, *supra*.

There are two reasons for which this class must fail: (1) It has not been shown that the members of the class will suffer immediate, irreparable loss or damage regarding either their purchase of replacement parts or of accessories, and (2) The named plaintiff-dealers, as representative parties, will not be able to fairly and adequately protect the interests of the class under FRCP 23(a)(4) as it has not been shown that they will suffer immediate, irreparable loss or damage if an injunction is not ordered.³

While failure to prove the fact of injury as required under 15 U.S.C. §15 will not bar injunctive relief, the failure to show that plaintiff will suffer immediate, irreparable damage will bar such injunctive relief. The plaintiff must show a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562

3. As observed in note 1, *supra*, there is some ambiguity in plaintiffs' complaint as to which named plaintiffs seek to represent the class of retailers. Even if plaintiff-distributors are said to represent the class, the class must fail under FRCP 23(a)(4) as plaintiff-distributors' motion for a preliminary injunction must be denied on grounds of res judicata. See *infra*.

(1969). Further, the threatened loss or damage must be of a type personal to the plaintiff. *United States v. Borden Co.*, 347 U.S. 514, 74 S.Ct. 703 (1954).

Plaintiffs allege in their motion for a preliminary injunction that if the injunction does not issue, plaintiff-dealers and the class they seek to represent will no longer have a free marketplace in which to function but will be compelled to depend entirely upon the defendant for their source of supply at whatever price and terms the defendant sets and will have to accept any level of service provided by the defendant. In essence, plaintiff-dealers allege that there will be higher prices and lower levels of service. But plaintiffs failed to meet their burden of establishing the truth or reasonable probability of these assertions.

II a. Replacement Parts

Plaintiffs could advance no more than mere speculation as to whether they would be harmed if OMC were the only source of OMC replacement parts. One dealer "had a feeling" that such a situation might restrict his freedom. He was not sure that distributor services such as the use of a WATS line would be discontinued. Some dealers expressed fears that if OMC were the only source of OMC replacement parts, pressure might be applied to the dealers to buy marine accessories from OMC.⁴ There was, however, no credible evidence that such pressure would be or could be effectively applied. Several dealers stated, in fact, that if such pressure were applied, they would completely discontinue doing business with OMC, i.e., they would discontinue carrying Johnson or Evinrude

4. Some plaintiffs' fears, which appear more illusory than real, might have been enhanced by distributors' letters to them, soliciting dealers' help in the distributors' fight to continue their business with OMC. See defendants' exhibits A through J and N. See especially defendants' exhibit G.

motors and switch to selling Mercury or some other of OMC's competitors' equipment. It was stated that OMC likely realizes that dealers would take such action and so would not apply such pressure since there was "a lot of competition" among manufacturers for good dealers. The evidence also indicated that OMC wants its dealers to have replacement parts because they are concerned that the dealers provide a high level of service to consumers of OMC products.

Two dealers testified that OMC is now their sole source of outboard motors. In spite of this, there has been no pressure to buy replacement parts from the OMC depots, or to buy other OMC products, i.e., accessories. Further, OMC has been very helpful to the dealers, sending service representatives and service bulletins to dealers and providing people from OMC's engineering staff to aid dealers. Thus, in a situation analogous to OMC's being the sole source of replacement parts, that is, OMC is now the sole source of Johnson and Evinrude motors, there has been no indication of the low levels of service or the coercion that plaintiffs' complaint predicts. In fact, there is evidence that if OMC is the sole distributor of its replacement parts, service to Johnson and Evinrude dealers will be improved. The OMC system will provide parts depots throughout the United States, all having the benefit of a central computer and communications system. Such a system will be useful in locating parts temporarily in short supply.

Thus, regarding parts, plaintiff-dealers have not shown irreparable harm. Plaintiff-dealers have only testified that they might encounter less favorable prices or terms or poorer service if OMC is the only supplier of replacement parts. Their testimony was highly speculative. If, after OMC is the sole distributor of replacement parts, such

conditions are shown to exist, such that there is a violation of the antitrust laws, plaintiff-dealers could then seek to recover damages.

II b. Accessories

Plaintiffs' arguments regarding accessories are completely benign; they are pure speculation. Even if both OMC accessories and non-OMC accessories are included, OMC's share of the United States market in accessories is only approximately 2.6%. In order to make a claim based upon accessories, plaintiffs would have to convince the court of the reasonable probability that OMC would use tie-in sales. There is, however, quite persuasive evidence that OMC would not resort to such tactics. It was noted above that while OMC is the only source of Johnson and Evinrude motors, it has not resorted to tie-in sales or other such anticompetitive measures in connection with its sales of outboard motors. Further, many OMC dealers are "dual dealers", that is, they handle OMC motors and the motors of one or more of OMC's competitors. There was no credible evidence that OMC does anything to discourage such dual dealerships.

Plaintiff-retailers testified that the accessories market is "highly competitive." Most dealers are called on by many accessories salesmen whom they feel will continue to call on them after OMC is the sole source of replacement parts. The dealers testified they would continue to buy their parts as they now do, "shopping" for the best prices, terms, and service. In fact, one of plaintiffs' witnesses said he would still buy accessories from Covert Marine, a plaintiff-distributor in this case, even if Covert no longer carried OMC replacement parts. And another of plaintiffs' witnesses testified that he did not believe that OMC being the only source of parts would affect the accessories market.

Thus, there is no evidence other than vague speculation of immediate and irreparable injury to plaintiff-dealers or the class they seek to represent. Therefore, under the facts of this case, it would be improper to certify such a class or to issue the preliminary injunction they request. If the day comes when OMC is shown to have violated the antitrust laws in its distribution of parts and accessories through tying-in or other anticompetitive measures, that would be the proper time for a suit to be brought, not at this time, when no evidence of injury to retail dealers or anticompetitive activity other than unsupported speculative opinion has been shown.

If, in the future, there is evidence of damage, resulting from defendant's violation of the antitrust laws, plaintiff-retailers can seek to recover such damage under 15 U.S.C. §15 and can endeavor to reinstate an independent system of distribution of OMC replacement parts. Despite the fact that plaintiff-distributors allege that once ended, the independent system of parts distribution will be irrevocably lost, there was much evidence that such a system could be effectively reinstated. OMC receives on the average "an inquiry a month" from parties seeking OMC parts and accessories distributorships. While the building of a distributorship where there had been no previous business would involve an investment of close to \$2 million, witnesses testified that a present marine distributor, *e.g.*, a distributor now handling non-OMC parts or accessories, or a person in a parts business akin to marine parts could transfer to the distribution of OMC parts and accessories with relative ease.

Plaintiff-retailers have failed to make out a case for a class action or for a preliminary injunction. Named plaintiff-retail dealers have failed to show a significant threat of injury from an impending violation of the anti-

trust laws that is personal to themselves or to the class of retailers they would represent. They have also failed to show that they would have no adequate remedy at law. *Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Products, Inc.*, 545 F.2d 1096 (7th Cir. 1976).

Neither is it probable on the facts now before the court that plaintiff-retail dealers could succeed with their claim on the merits under 15 U.S.C. §15, for there, the required proof of injury is injury in fact, a level of proof more difficult to support than that for an injunction under 15 U.S.C. §26. Before OMC's proposed distribution system goes into effect, none of the plaintiff-dealers or the class they purport to represent would be able to show injury in fact, a requirement of standing under 15 U.S.C. §15.

III. Plaintiff-distributors

Plaintiff-distributors pray under 15 U.S.C. §26 that OMC be enjoined from refusing to sell replacement parts to independent wholesale distributors east of the Rockies, and that OMC be enjoined from purchasing inventories of replacement parts from such distributors. However, under the unique circumstances of this case, the court is not free to consider this current issue alone.

In 1971, Covert Marine, Inc., Crandall-Hicks Company, Inc., Eastern Outboard Parts Corporation, Griffin's Outboard Marine, Inc., Loe Marine Supply Company, Inc., and Pyron & Garrow Parts Depot, Inc., commenced an action against defendant OMC and a subsidiary in this court (Civil Action No. 71-F-104). In that action, plaintiff-distributors complained that their proposed replacement by OMC's direct distribution to retailers of parts for the repair and maintenance of OMC's outboard motors violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2).

Plaintiff-distributors in Covert I also complained that OMC, in violation of §2 of the Sherman Act "has attempted and is attempting to monopolize and has monopolized" the distribution of OMC parts and the distribution of OMC and non-OMC accessories. Covert I complaint, §42.

After extensive discovery and briefs with respect to a hearing on a preliminary injunction motion, and after extensive negotiations under the guidance of able counsel on both sides, the plaintiff-distributors and OMC drafted and agreed to the entry of a Final Judgment on May 23, 1972.

That Covert I Final Judgment in part provides:

The term of the OMC Parts and Accessories Distributor Agreement between each plaintiff and defendant Outboard Marine Corporation . . . shall be extended to September 30, 1978, and any provision therein for earlier expiration or termination without cause is hereby cancelled, and each such Agreement shall thereupon terminate and be of no further force and effect and defendant Outboard Marine Corporation shall have no further obligation to deal with any plaintiff. (Article III, Final Judgment);

Upon termination of each Agreement, Outboard Marine Corporation shall repurchase and each plaintiff shall sell to Outboard Marine Corporation . . . such new saleable OMC products, parts and accessories as are covered by such Agreement as said plaintiff may have on hand . . . (Article IV, Final Judgment);

Except as expressly provided herein, each and every claim asserted in the Complaint is hereby dismissed with prejudice. (Article VIII, Final Judgment).

On February 23, 1977, the six plaintiff-distributors, this time joined by plaintiff-retailers, commenced the in-

stant action against OMC in the Western District of Missouri. Again, the essence of the charge is that the termination by OMC of business relationships with the plaintiff-distributors on September 30, 1978, violates Sections 1 and 2 of the Sherman Act.

While plaintiffs have attempted to differentiate this claim from Covert I through the addition of plaintiff-retailers and through increased emphasis on accessories, the cause of action presented in Covert II is virtually the same cause of action as was asserted in Covert I.⁵ In fact, many parts of the Covert II complaint seem to have been taken verbatim from the Covert I complaint or to have been only slightly paraphrased, even though plaintiffs do not now have the same counsel as they had in Covert I. Compare, for example, ¶15 of the Covert I complaint with the first paragraph on page 12 of the Covert II complaint; compare ¶¶20 through 25 of the Covert I complaint with pages 12 and 13 of the Covert II complaint. The offense charged in the Covert II complaint is, in essence, the same as that

5. Plaintiffs' reply to affirmative defenses of estoppel and res judicata filed November 21, 1977, attempts to distinguish Covert II from Covert I by saying that Covert I sought a continuation of the OMC Parts and Accessories Distribution Agreements between Plaintiff-distributors and defendant while in Covert II, the relief sought is the prevention of the elimination of the independent distribution system of replacement parts for Johnson and Evinrude motors.

The only potentially significant difference between Covert I and Covert II and the only difference noted by plaintiffs in their reply, is the above-mentioned difference in the prayer for relief. But when it is noted that the plaintiffs in Covert I comprise six of the seven independent distributors east of the Rockies, it is clear that this is a distinction without a difference. Further, in the context of the preliminary injunction currently before the court, the prayer for relief in plaintiffs' motion for preliminary injunction specifically requests that defendant be enjoined to continue to sell parts and accessories to *plaintiff wholesalers*, to continue to deal with *plaintiff wholesalers*, not to refuse to sell to *plaintiff wholesalers* and not to terminate *plaintiff wholesalers* as distributors of OMC products. Thus, even this strained distinction, the only one that plaintiffs advance in their reply, is non-existent.

charged in Covert I; compare pages 26-28 of the Covert II complaint with ¶¶33-47 of the Covert I complaint.

In addition, ¶E of the Covert II complaint includes the terms of Articles II through VII of the Final Judgment in Covert I as part of the offense charged in Covert II; these were the very terms the plaintiff-distributors themselves agreed to in settlement of the Covert I lawsuit. Thus, Covert II is an attack on the Covert I Final Judgment. Further, the prayer in Covert II requesting an injunction which would force OMC to continue dealing with the plaintiff-distributors and preventing OMC from repurchasing the OMC products, seeks to nullify Articles III and IV of the judgment.

Notwithstanding denials now, all parties at the time of the Final Judgment in Covert I anticipated the termination of the distribution contracts as of September 30, 1978. See ¶E, page 28, Covert II complaint. Since the entry of that Final Judgment, however, few of the plaintiff-distributors have taken significant steps to find substitute lines of merchandise or to otherwise prepare for the termination of the distribution contracts. The only logical inference from such inaction is that plaintiff-distributors did not intend, even on the day the terms of the Final Judgment were agreed upon and the Judgment approved, to be bound by its terms. Even though plaintiff-distributors accepted and enjoyed the benefits of the agreement as fully performed by defendant, plaintiffs now are unwilling to perform their part of the agreement.

A Consent Judgment, whether at law or in equity has res judicata effect, notwithstanding *Lawlor v. National Screen Service Corporation*, 349 U.S. 322, 75 S.Ct. 865 (1955). See Moore, Vol. 1B ¶0.409, pp. 1026-27, 2d ed. 1974. As a general rule, consent decrees are accorded res judicata effect. *United States v. Southern Ute Tribe or Band of*

Indians, 402 U.S. 159, 91 S.Ct. 1336 (1971); *Wallace Clark & Co. v. Acheson Indus., Inc.*, 532 F.2d 846 (2nd Cir. 1976), cert. denied, 425 U.S. 976, rehearing denied 427 U.S. 908 (1976). In *Brunswick Corporation v. Chrysler Corporation*, 408 F.2d 335 (7th Cir. 1969), the court, quoting from its opinion in *O'Cedar Corporation v. F.W. Woolworth Corp.*, 66 F.2d 363, 366 (7th Cir. 1933), said:

* * * [A] decree of a court having jurisdiction of the subject matter rendered by consent of the parties, though without any ascertainment by the court of the truth of the facts averred, is as binding and conclusive between the parties and their privies as if the suit had been an adversary one. 408 F.2d at 337.

In addition, a stipulation of dismissal with prejudice or dismissal with prejudice at any stage of the proceedings, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action. *Astron Industrial Assoc., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir. 1968).

At first glance, *Lawlor*, *supra*, would seem to allow plaintiffs to bring the present action. *Lawlor*, however, can be distinguished on its facts. While acknowledging that a judgment dismissing a previous suit with prejudice bars a later suit on the same cause of action, the *Lawlor* court determined that the later suit in that case was not based on the same cause of action as was the former suit. The court noted new antitrust violations, deliberately slow and erratic deliveries of advertising materials in an effort to destroy petitioner's business, and tie-in sales, among others, not present in the former action. It noted that such claims did not even exist and could not possibly have been sued upon in the previous case. It also noted that in the interim, there had been a substantial change in the scope of the defendants' alleged monopoly in that five other film pro-

ducers had granted exclusive licenses to National Screen, with the result that National Screen's control over the entire market for motion picture advertising posters, i.e., standard accessories, (not only for a particular brand of such accessories), had increased to nearly 100%.

Such is certainly not the case here. OMC has fully performed its obligations under the Consent Judgment from Covert I. There were some implications that OMC was slow in delivering replacement parts to its independent distributors in that there was a back-order problem. But such problem, if, in fact it existed, was fully explained by plaintiffs' own witnesses as being wholly unintentional on the part of OMC. Further, some retail dealers testified that during this time of increased back-order problems, replacement parts were in better supply through the independent distributors than through OMC's own depots. Although plaintiffs again suggested that tie-in sales might result if OMC is not enjoined to retain the independent system of distribution for its replacement parts and accessories, no present or past evidence of such tie-in sales was introduced. See Covert I complaint, ¶33d, p. 13. Plaintiffs could offer no more than mere speculation. Further, plaintiffs could not show that the scope of the alleged monopoly had increased. In 1971, OMC planned to terminate the independent distributors, substituting its own depots as distributors of OMC replacement parts and accessories. In 1978, OMC again desires to follow that same plan, this time in accordance with the provision of the Final Judgment in Covert I. OMC has not increased its share of the outboard motor market since 1971, in fact, there was evidence that its market share may have diminished.

Thus, because the same identical distributor-plaintiffs are involved in Covert II as were involved in Covert I, and because Covert II arises out of the same cause of action as

did Covert I which embraced the manufacture, sale and distribution of both OMC parts and accessories (see Covert I complaint, ¶¶33-47), the present motion for preliminary injunction is foreclosed as to plaintiff-distributors by the principle of res judicata.⁶ As the *Wallace Clark* court said: "Judicial decrees disposing of issues in active litigation cannot be treated as idle ceremonies without denigrating the judicial process." 532 F.2d at 849.

The preliminary injunction which plaintiffs seek is an order that defendant be required to continue to do business with the plaintiff-distributors after September 30, 1978. The plaintiff-distributors having previously litigated such issue in this court and having entered into the Final Judgment in Covert I, are bound by such Judgment and are barred thereby from relitigating such issue. Therefore, plaintiff-distributors have no reasonable likelihood of success on the merits in Covert II.

Further, plaintiff-distributors will not be irreparably harmed by a violation of the antitrust laws if the injunction does not issue. It may be true that if an injunction does not issue, plaintiff-distributors will lose substantial parts of their businesses. But such loss would not be the result of any antitrust violation on the part of defendant; rather, it would be the result of the plaintiff-distributors' own agreement to settle their claim against defendant in return for defendant undertaking to do business with them until September 30, 1978. Plaintiff-distributors agreed that thereafter defendant would have no further obligation to deal with them. Having no reasonable expectation of con-

6. Chief Judge Oliver, in his June 13, 1978, order to transfer the matter to this court, referenced his opinion of October 18, 1977, where he noted that if the claims of plaintiff-dealers are foreclosed, "... All that remains in this litigation is to enforce the judgment already entered in the Northern District of Indiana."

tinued business with defendant after September 30, 1978, plaintiff-distributors can show no harm from defendant's termination of the business as per the terms of the Final Judgment. As with plaintiff-retailers, plaintiff-distributors must show a significant threat of injury from an impending violation of the antitrust laws. *Zenith Radio Corp.*, *supra*. As explained above, plaintiff-distributors' threat of injury is not from an impending violation of the antitrust laws but from the enforcement of the Final Judgment in Covert I, to which they, as sophisticated businessmen with advice of able counsel, agreed.

Finally, the threatened loss or damage must be of a type personal to the plaintiff. *United States v. Borden Co.*, *supra*. Again, plaintiff-distributors can show no personal injury as a result of the termination of the independent distribution system since they contracted away their rights to participate in that system in return for the promise that defendant would do business with them until September 30, 1978.

In the event that it is subsequently established in this or other litigation that defendant must maintain an independent system of parts distribution to avoid violation of the antitrust laws under the facts of this case, such system would not compel continued distribution through the six plaintiff distributors in this case.

This memorandum of decision contains the court's findings of fact and conclusions of law. Rule 52(a) F.R.C.P.

ORDER

It is, therefore, considered, ordered, adjudged and decreed that plaintiffs' motions for preliminary injunction and for class certification be and they are hereby denied.

Entered this 25th day of September, 1978.

/s/ Jesse E. Eschbach
United States District Judge

APPENDIX 3

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CIVIL NO. F 78-76

COVERT MARINE, INC., ET AL.,
Plaintiffs,

v.

OUTBOARD MARINE CORPORATION,
Defendant.

MEMORANDUM OF DECISION AND ORDER

This matter is before the court on plaintiffs' Motion for Injunction Pending Appeal from Order Denying Temporary Injunction filed October 6, 1978. The applicant for such an injunction must: (1) make a strong showing that he is likely to succeed on the merits of the appeal; (2) establish that he is likely to suffer irreparable injury from the denial of the stay; (3) establish that no substantial harm will come to other interested parties, and (4) establish that a stay will do no harm to the public interest. Wright & Miller, Federal Practice and Procedure: Civil §2904; *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972); *Griffin v. Richardson*, 346 F.Supp. 1226 (D. Md. 1972), *aff'd*, 409 U.S. 1069, 93 S.Ct. 689 (1972).

Because the plaintiffs have not made the requisite showing on these matters, the motion will be denied.

Plaintiffs have made no attempt in their motion of October 6, 1978 to make a showing of likely success on

the merits of the appeal. Neither is it likely that they could make such a showing. To succeed on the merits of their appeal, plaintiffs would have to show at least a reasonable likelihood of success on the merits of their underlying claim. *Fox Valley Harvestore, Inc. v. A. O. Smith Harvestore Products, Inc.*, 545 F.2d 1096 (7th Cir. 1976). As plaintiff's underlying claim is barred on the basis of *res judicata*, and as plaintiffs' case would also be barred by their failure to meet the standing requirements of 15 U.S.C. §15, i.e., they would not be able to make a showing of injury in fact due to a violation of the anti-trust laws, see Memorandum of Decision and Order issued September 25, 1978.

They have not met and could not meet the first requirement: that they make a strong showing of the likelihood of success on the merits of their appeal.

Plaintiffs likewise have not established that they are likely to suffer irreparable injury from the denial of the stay. Any "injury" that plaintiffs might suffer would be due to their own agreement to settle their claim in Covert I against defendant in return for defendant's undertaking to do business with them until September 30, 1978. Having no reasonable expectation of continued business with defendant after September 30, 1978, plaintiff-distributors can show no harm from defendant's termination of the business as per the terms of the Final Judgment in Covert I or from the denial of the injunction. Nor have plaintiff-retailers made any credible showing of impending injury or injury in fact.

Further, plaintiffs have not established that no substantial harm will come to other interested parties. In fact, testimony was given at the hearing of August 17, 20, and 21, 1978 on plaintiffs' motion for a preliminary injunction indicating that Outboard Marine Corporation had in-

vested large sums of money in building their new depots, in setting up their computer network among the depots, and in hiring and training staff for the new depots. If an injunction pending appeal were granted, all of this would stand idle, causing substantial injury to Outboard Marine Corporation.

Plaintiffs state in their motion that the status quo as of September 29, 1978 can be maintained because defendant OMC has not taken over the inventories of plaintiff wholesalers and will not do so until after October 30, 1978. This is not an entirely accurate statement of the facts. The only thing remaining on October 30, 1978 is for OMC to repurchase the inventory from the plaintiff wholesalers, a strictly logistical detail resulting from the prior termination of their business relationship. The actual termination of business with the wholesalers occurred on October 1, 1978 at which time the OMC depots were activated. As the new OMC depots have already opened and begun business, the status quo of September 29, 1978 can no longer be maintained.

Therefore, for the reasons stated herein and for the further reasons stated in the court's Memorandum of Decision and Order of September 25, 1978, plaintiffs' motion filed October 6, 1978 will be denied.

ORDER

Accordingly, it is ordered that plaintiffs' Motion for Injunction Pending Appeal from Order Denying Temporary Injunction filed October 6, 1978, be and it hereby is denied.

Entered this 31st day of October, 1978.

/s/ Jesse E. Eschbach

United States District Judge

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

Civil Action No. 77-0082 CV

Jury Trial Requested

COVERT MARINE, INC., ET AL.,
Plaintiffs,

vs.

OUTBOARD MARINE CORPORATION,
Defendant.

COMPLAINT

Plaintiffs, by their undersigned attorneys, on their own behalf and as representatives of the class herein described, bring this civil action against the defendant herein and for their claims state as follows:

JURISDICTION AND VENUE

This complaint is filed and these proceedings are instituted under Sections 4, 15 and 16 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, 736 and 737, as amended (15 U.S.C. 15, 25, 26), commonly known as the Clayton Act, against the named defendant in order to secure damages from and injunctive relief against said defendant for violations as hereafter alleged of Sections 1 and 2 of the Sherman Act (15 U.S.C., 1, 2), and for declaratory judgment under the Federal Declaratory Judgment Act

(28 U.S.C. 2201-02). The jurisdiction of this Court is based upon 28 U.S.C. Section 1337 which grants original jurisdiction to the district courts over any civil action or proceeding arising under any Act of Congress regulating or protecting trade and commerce against restraints and monopolies.

The corporate defendant does business, transacts business, is found and has agents within the State of Missouri, and within the jurisdiction of the United States District Court for the Western District of Missouri. The defendant is subject to the jurisdiction and venue of this Court, 15 U.S.C. Section 15, 15 U.S.C. Section 22 and 28 U.S.C. Section 1391.

DEFINITIONS

As used herein the following terms have the meaning indicated:

a. The term "purchaser for resale" is any person, firm, partnership or corporation purchasing replacement parts for resale.

b. The term "replacement part" is any product used in the replacement, repair or maintenance of outboard motors, including Johnson and Evinrude Outboard Motors.

THE PLAINTIFFS

Plaintiff Covert Marine, Inc. (hereinafter sometimes referred to as "Covert") is a corporation incorporated under the laws of the State of Missouri, having its principal place of business at 708 East 18th Street, Kansas City, Missouri. Covert is and has been an independent wholesale distributor of replacement parts in the United States east of the Rockies area. Covert is and has been engaged in the business of purchasing replacement parts from manufacturers including defendant for resale to retailers in the United States east of the Rockies area.

Plaintiff Crandall-Hicks Company, Inc. (hereinafter sometimes referred to as "Crandall-Hicks") is a corporation incorporated under the laws of the State of Massachusetts, having its principal place of business at Route 9 1/4 Mile East of 495, Southboro, Massachusetts. Crandall-Hicks is and has been an independent wholesale distributor of replacement parts in the United States east of the Rockies area. Crandall-Hicks is and has been engaged in the business of purchasing replacement parts from manufacturers including defendant for resale to retailers in the United States east of the Rockies.

Plaintiff Eastern Outboard Parts Corporation (hereinafter sometimes referred to as "Eastern") is a corporation incorporated under the laws of the State of New Jersey, having its principal place of business at 16 Daniel Road, Fairfield, New Jersey. Eastern is and has been an independent wholesale distributor of replacement parts in the United States east of the Rockies area. Eastern is and has been engaged in the business of purchasing replacement parts from manufacturers including defendant for resale to retailers in the United States east of the Rockies area.

Plaintiff Griffin's Outboard Marine, Inc. (hereinafter sometimes referred to as "Griffin's") is a corporation incorporated under the laws of the state of Georgia, having its principal place of business at 3700 Northeast Freeway, Atlanta, Georgia. Griffin's is and has been an independent wholesale distributor of replacement parts in the United States east of the Rockies area. Griffin's is and has been engaged in the business of purchasing replacement parts from manufacturers including defendant for resale to retailers in the United States east of the Rockies area.

Plaintiff Loe Marine Supply Co., Inc. (hereinafter sometimes referred to as "Loe Marine Supply") is a cor-

poration incorporated under the laws of the State of Louisiana, having its principal place of business at 147 East Stoner, Shreveport, Louisiana. Loe Marine Supply is and has been an independent wholesale distributor of replacement parts in the United States east of the Rockies area. Loe Marine Supply is and has been engaged in the business of purchasing replacement parts from manufacturers including defendant for resale to retailers in the United States east of the Rockies area.

Plaintiff Pyron & Garrow Parts Depot, Inc. (hereinafter sometimes referred to as "Pyron & Garrow") is a corporation incorporated under the laws of the State of Georgia, having its principal place of business at 1450 Howell Mill Road, N.W., Atlanta, Georgia. Pyron & Garrow is and has been an independent wholesale distributor of replacement parts in the United States east of the Rockies area. Pyron & Garrow is and has been engaged in the business of purchasing replacement parts from manufacturers including defendant for resale to retailers in the United States east of the Rockies area.

Plaintiff B & T Boat Co., Inc. (hereinafter sometimes referred to as "B & T Boat") is a corporation incorporated under the laws of the State of New York, having its principal place of business on Montauk Highway, East Hampton, New York. B & T Boat is and has been a retailer of replacement parts in the United States east of the Rockies area. B & T Boat is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Lowe Industries, Inc., d/b/a Bridgeport, Marina, (hereinafter sometimes referred to as "Bridgeport") is a corporation incorporated under the laws of the State

of Missouri, having its principal place of business at West End of Glaize Bridge, Highway 54, Osage Beach, Missouri. Bridgeport is and has been a retailer of replacement parts in the United States east of the Rockies area. Bridgeport is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Brownie's Boat Center, Inc. (hereinafter sometimes referred to as "Brownie's") is a corporation incorporated under the laws of the State of Kansas, having its principal place of business at 400 East 29th Street, Topeka, Kansas. Brownie's is and has been a retailer of replacement parts in the United States east of the Rockies area. Brownie's is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Corr's Mariner's Cove, Inc. (hereinafter sometimes referred to as "Corr's Mariner's Cove") is a corporation incorporated under the laws of the State of New York, having its principal place of business at 9 Canoe Place Road, Hampton Bay, New York. Corr's Mariner's Cove is and has been a retailer of replacement parts in the United States east of the Rockies area. Corr's Mariner's Cove is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Heritage Marine, Inc. (hereinafter sometimes referred to as "Heritage") is a corporation incorporated under the laws of the State of New York, having its principal place of business at 246 North Main Street, Sayville,

New York. Heritage is and has been a retailer of replacement parts in the United States east of the Rockies area. Heritage is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Island Marine Base, Inc. (hereinafter sometimes referred to as "Island Marine") is a corporation incorporated under the laws of the State of New York, having its principal place of business at 2832 Merrick Road, Bellmore, L.I., New York. Island Marine is and has been a retailer of replacement parts in the United States east of the Rockies area. Island Marine is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Kydds Marine Center, Inc. (hereinafter sometimes referred to as "Kydds") is a corporation incorporated under the laws of the State of New York, having its principal place of business at 5000 Sunrise Highway, Massapequa Park, L.I., New York. Kydds is and has been a retailer of replacement parts in the United States east of the Rockies area. Kydds is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Long Beach Sports Marina, Inc. (hereinafter sometimes referred to as "Long Beach") is a corporation incorporated under the laws of the State of New York, having its principal place of business at Long Beach, New York. Long Beach is and has been a retailer of replacement parts in the United States east of the Rockies area. Long

Beach is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Lyon Bros. & Sons, Inc. (hereinafter sometimes referred to as "Lyon") is a corporation incorporated under the laws of the State of New York, having its principal place of business at 30 Shore Road, East Setauket, New York. Lyon is and has been a retailer of replacement parts in the United States east of the Rockies area. Lyon is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff John McConnell, d/b/a Mac's Service Center (hereinafter sometimes referred to as "Mac's Service Center"), has his principal place of business on Route #4, Lake Lotawana, Missouri. Mac's Service Center is a retailer of replacement parts in the United States east of the Rockies area. Mac's Service Center is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff The Mooring (hereinafter sometimes referred to as "Mooring") is a corporation incorporated under the laws of the State of New York, having its principal place of business at 3280 Brower Avenue, Oceanside, New York. Mooring is and has been a retailer of replacement parts in the United States east of the Rockies area. Mooring is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Moriches Marine Corporation, d/b/a Moriches Boat & Motor (hereinafter sometimes referred to as "Moriches"), is a corporation incorporated under the laws of the State of New York, having its principal place of business on Atlantic Avenue, East Moriches, New York. Moriches is and has been a retailer of replacement parts in the United States east of the Rockies area. Moriches is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Outboard Service of Al Grover's, Inc. (hereinafter sometimes referred to as "Outboard Service") is a corporation incorporated under the laws of the State of New York, having its principal place of business at 180 Woodcleft Avenue, Freeport, L.I., New York. Outboard Service is and has been a retailer of replacement parts in the United States east of the Rockies area. Outboard Service is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff J. M. McCormack, d/b/a Royal Craft Boats (hereinafter sometimes referred to as "Royal Craft"), has his principal place of business at 2715 Truman Road, Kansas City, Missouri. Royal Craft is and has been a retailer of replacement parts in the United States east of the Rockies area. Royal Craft is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Stovall Tire and Marine, Inc. (hereinafter sometimes referred to as "Stovall") is a corporation incorporated under the laws of the State of Georgia, having its principal place of business at 5840 I-75 South, Forest Park, Georgia. Stovall is and has been a retailer of replacement parts in the United States east of the Rockies area. Stovall is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff S.V. Geraghty Marine (hereinafter sometimes referred to as "Geraghty") is a corporation incorporated under the laws of the State of New York, having its principal place of business at 14 Bayville Road, Bayville, L.I., New York. Geraghty is and has been a retailer of replacement parts in the United States east of the Rockies area. Geraghty is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff, Arrow Marine, Inc. (hereinafter sometimes referred to as "Arrow Marine") is a corporation incorporated under the laws of the State of New York, having its principal place of business at 1072 Old Northern Boulevard, Roslyn, Long Island, New York. Arrow Marine is and has been a retailer of replacement parts in the United States east of the Rockies area. Arrow Marine is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff H. P. Brown, Inc. (hereinafter sometimes referred to as "Brown") is a corporation incorporated

under the laws of the State of New York, having its principal place of business at 5300 Kings Plaza, Brooklyn, New York. Brown is and has been a retailer of replacement parts in the United States east of the Rockies area. Brown is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Ervin's, Inc. (hereinafter sometimes referred to as "Ervin's") is a corporation incorporated under the laws of the State of Kansas, having its principal place of business at 2121 Main Street, Parsons, Kansas. Ervin's is and has been a retailer of replacement parts in the United States east of the Rockies area. Ervin's is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Kingsman II, Inc., d/b/a Midwest Marine (hereinafter sometimes referred to as "Midwest Marine"), is a corporation incorporated under the laws of the State of Missouri, having its principal place of business at 5412 Highway 63 North, Columbia, Missouri. Midwest Marine is and has been a retailer of replacement parts in the United States east of the Rockies area. Midwest Marine is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

Plaintiff Manhasset Bay Outboard, Inc. (hereinafter sometimes referred as "Manhasset Bay") is a corporation incorporated under the laws of the State of New York, having its principal place of business at 78 Shore Road, Port Washington, New York. Manhasset Bay is and has

been a retailer of replacement parts in the United States east of the Rockies area. Manhasset Bay is and has been engaged in the business of purchasing replacement parts from independent wholesale distributors for resale to owners and operators of outboard motors in the United States east of the Rockies area.

THE DEFENDANT

Defendant (hereinafter sometimes referred to as "OMC") is a corporation incorporated under the laws of the State of Delaware. Its principal executive office is located at 100 Sea-Horse Drive, Waukegan, Illinois. OMC is, and for many years has been, engaged in the business of manufacturing, selling and distributing various products, among which the principal products are and have been marine products. The marine products manufactured, sold and distributed by OMC include and have included diverse products, such as outboard motors, stern drive engines, marine accessories and replacement parts.

THE CLASS

This action is brought by plaintiffs on their own behalf and as representatives pursuant to Rule 23, Federal Rules of Civil Procedure, of a class of persons, firms, partnerships, and corporations who currently are purchasers for resale of replacement parts located in the United States east of the Rockies area as defined herein. Class members are and have been engaged in the business of purchasing for resale replacement parts in the United States east of the Rockies area. There are presently approximately 12,500 class members. The class members described herein are so numerous as to make it impractical to join all members as plaintiffs; such persons have been wronged and damaged by the acts and practices alleged herein; and there are

questions of law and fact common to all members of the class which predominate over any questions affecting only individual members of the class. The claims of plaintiffs are typical of the claims of the members of the class, and the interests of the class members will be fairly and adequately protected by the representative parties. The defendant has acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole as herein described. The class action procedure for the class described herein is superior to other methods for the fair and efficient adjudication of the controversy herein described.

Plaintiffs, in their capacity as purchasers for resale of replacement parts in the United States east of the Rockies area, as defined herein, bring this suit against the defendant on their own behalf and as representatives of the class herein described under Sections 4, 15 and 16 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, 736 and 737, as amended (15 U.S.C., Secs. 4, 25 and 26), entitled, "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes," commonly known as the Clayton Act, to recover treble damages and for injunctive relief and costs of suit, including a reasonable attorney's fee, against the defendant for the injuries sustained and being sustained by plaintiffs and the class herein described by reason of defendant's violations, as hereinafter alleged, of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C., Sec. 1, 2 (1958)), entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, and for declaratory judgment under the Federal Declaratory Judgment Act (28 U.S.C. Sec. 2201-02).

TRADE AND COMMERCE

OMC is, and for many years past has been, engaged in the business of manufacturing, distributing and selling in interstate commerce throughout the United States various products, among which the principal products are and have been marine products. The marine products manufactured, distributed and sold by OMC in interstate commerce include and have included outboard motors which is and always has been its principal product. OMC markets its marine products under various trademarks and trade names, including the trade names "Johnson" and "Evinrude."

OMC is, and for many years past has been, engaged in the business of manufacturing, distributing and selling parts and accessories for its marine products in interstate commerce. Such parts and accessories are marketed by OMC under the trade names "Johnson," "Evinrude" and "OMC."

OMC manufactures, distributes and sells to independent wholesale distribution distributors located in the United States east of the Rockies area a full line of the replacement parts needed to repair and service Johnson and Evinrude outboard motors—a line which independent distributors could not duplicate by selling products offered by any other manufacturer or group of manufacturers. Retail establishments in the business of repairing and servicing Johnson and Evinrude outboard motors depend upon independent wholesale distributors for the replacement parts essential to this business.

OMC has enjoyed a pre-eminent position in the marine industry since its formation in 1936 through a consolidation of Outboard Motor Company and Johnson Motors Company, which were competing manufacturers of marine

products, replacement parts and accessories. Since the time of this consolidation, OMC has been and remains the world's largest manufacturer of outboard motors.

OMC's position in the market for marine products, replacement parts and accessories was achieved by, among other means, a series of mergers and consolidations between OMC (or its predecessors in interest) and other companies. In 1929, three separate and distinct corporate manufacturers of marine products, parts and accessories, Elto Outboard Motors Company, Evinrude Motor Company and Lockwood Motor Company, consolidated the operations in one corporation, Outboard Motors Company. In 1936, Outboard Motors Company consolidated with Johnson Motors Company, a competing corporate manufacturer of marine products, parts and accessories to form defendant OMC (then called "Outboard Marine and Manufacturing Corporation").

In OMC's fiscal years ending on September 30, 1969, 1970, 1971, 1972, 1973, 1974, 1975 and 1976, OMC had over-all sales of more than \$327 million, \$304 million, \$353 million, \$376 million, \$453 million, \$463 million, \$498 million and \$581 million in each such fiscal year, respectively. In each such fiscal year, respectively, OMC's sales of marine products and parts were more than \$235 million, \$217 million, \$259 million, \$290 million, \$350 million, \$346 million, \$381 million and \$467 million.

OMC is one of the world's largest manufacturers and sellers of marine products, replacement parts and accessories. In the past ten years, it has manufactured and sold over \$2-1/2 billion worth of marine products, replacement parts and accessories.

OMC's business of manufacturing, distributing and selling outboard motors, and replacement parts and accessories therefor is, and for many years past has been, carried

on by OMC's Johnson Motors Division (hereinafter referred to as "Johnson Motors") and OMC's Evinrude Motors Division (hereinafter referred to as "Evinrude Motors"). Johnson Motors operates OMC's manufacturing plant in Waukegan, Illinois. Johnson Motors sells and distributes marine products solely under the trade name "Johnson." Evinrude Motors operates OMC's manufacturing plant in Milwaukee, Wisconsin. Evinrude Motors sells and distributes marine products solely under the trade name "Evinrude."

Johnson Motors and Evinrude Motors are, and for many years past have been, held out to the public by OMC as separate and distinct businesses. Johnson Motors and Evinrude Motors are, and for many years past have been, held out to the public by OMC as competitors in the sale and distribution of outboard motors. Johnson Motors and Evinrude Motors have separate and distinct marketing organization. Johnson Motors and Evinrude Motors sell and distribute their outboard motors through separate and distinct systems of distribution.

Johnson Motors sells its marine products, including outboard motors directly to retail dealers in the area of the United States east of the Rocky Mountains. Such dealers (hereinafter referred to as "Johnson Dealers") enter into dealer agreements with Johnson Motors under which each dealer agrees (a) to devote its major promotion, advertising, selling and service efforts within a certain territory specified in the agreement, (b) to maintain a repair department in accordance with standards established by Johnson Motors, and (c) to supply prompt and efficient maintenance, warranty and repair service in its territory for all Johnson products specified in the agreement.

Evinrude Motors sells its marine products, including outboard motors directly to retail dealers in the area of

the United States east of the Rocky Mountains. Such dealers (hereinafter referred to as "Evinrude Dealers") enter into dealer agreements with Evinrude Motors under which each dealer agrees (a) to devote its major promotion, advertising, selling and service efforts within a certain territory specified in the agreement, (b) to maintain a repair department in accordance with standards established by Evinrude Motors, and (c) to supply prompt and efficient maintenance, warranty and repair service in its territory for all Evinrude products specified in the agreement.

Pursuant to its contractual obligations, each Johnson Dealer and each Evinrude Dealer is required to engage in the business of repairing and servicing outboard motors owned by members of the public. Repairing and servicing such outboard motors is a profitable business for Johnson Dealers and Evinrude Dealers.

Outboard motors are and have always been OMC's principal marine products. OMC is the world's largest manufacturer and seller of outboard motors. OMC has been the world's largest manufacturer and seller of outboard motors since its formation in 1936.

OMC is the dominant manufacturer and seller of outboard motors in the United States as a whole, and in that part of the United States east of the Rocky Mountains.

There are at least 3,500,000 outboard motors manufactured by OMC presently in use in the United States. During the past decade, OMC has manufactured more than 50 per cent of all outboard motors sold in the United States. Within some horsepower ranges, OMC has in some years manufactured more than 75 per cent of all such outboard motors sold in the United States. In each year from 1963 through 1976, inclusive, approximately 50 per cent of OMC's sales of outboard motors have been comprised of

two cycle water cooled outboard motors of horsepowers ranging from 4.0 to 29.9, inclusive.

Since at least 1965 there have been only two other manufacturers that OMC has recognized as competitive threats—Brunswick Corporation which entered the market through its acquisition of Kiekhaefer Corporation in the early 1960's and markets its motors under the brand name "Mercury," and Chrysler Corporation, which entered the market through its acquisition of West Bend Co. in 1965. Mercury and Chrysler are the only manufacturers other than OMC that market outboard motors in a full line of horsepower ratings. At present, the outboard lines offered by these three manufacturers contain models as small as 2 horsepower and as large as 175 horsepower.

There are a number of small firms that manufacture outboards of very low horsepower (less than 15 horsepower) which they sell at prices substantially lower than a Johnson or Evinrude motor of comparable size but which are not competitive with OMC in quality. Many of these lower-priced motors are manufactured as private-label merchandise for mass retailers, such as Sears and Montgomery Ward.

OMC at one time produced a low-priced line of outboards, which were sold through its Gale Products Division both to retail dealers and to Montgomery Ward and Firestone. In 1962, however, OMC decided to abandon the low-price market and has since concentrated on the marketing of "quality" motors through its traditional marketing channels—the Johnson and Evinrude dealer organizations. The two largest private label manufacturers at present are The Eska Company, in Dubuque, Iowa, and Clinton Engines Corporation, in Maquoketa, Iowa.

The Evinrude and Johnson divisions of OMC sell outboard motors under their respective brands to separate

dealer organizations, each of which consists of approximately 3,000 franchised dealers. Thus, the total number of dealers franchised by OMC is at least half of the 12,500 dealers in the United States. Each dealer is franchised for one year, and the Franchise Agreements are terminable "without cause at any time on thirty (30) days written notice." Typically, each dealer handles a complete line of marine products, including a line of accessories and miscellaneous supplies, but his line of Johnson or Evinrude outboard motors constitutes the essential element of his entire marine business.

For the past quarter century, OMC's success has been sustained by its ability to promote as separate products motors which, in fact, have been mechanically identical. By using separate brands—Johnson and Evinrude—to differentiate these identical motors and marketing them through separate Johnson and Evinrude marketing organizations, OMC has been able to maintain a number of dealers that is far greater than the number it could have franchised with a single brand. In addition, the illusion of separateness enables the Johnson and Evinrude divisions to appeal to different consumer preferences, even though the motors they offer are exactly mechanically the same.

OMC is the world's largest manufacturer, distributor and seller of replacement parts and accessories for marine engines. OMC is the only manufacturer of replacement parts which sells a complete line of the replacement parts needed to repair and service the Johnson and Evinrude outboard motors manufactured by OMC.

OMC is the sole manufacturer of the vast majority of replacement parts needed to repair and service the Johnson and Evinrude outboard motors manufactured by OMC. OMC is the dominant manufacturer of all such replacement parts.

OMC has no competition in the manufacture of most of the replacement parts for Johnson and Evinrude outboard motors. OMC has monopoly power in the manufacture, and in the sale at the manufacturing level, of replacement parts for Johnson and Evinrude outboard motors.

OMC itself manufactures practically all the essential parts used in the assembly of Johnson and Evinrude outboard motors and sells these parts, as well as the few parts it purchases from sources outside the company, for use as replacement parts.

There are no substitutes on the market for 97 per cent of the 18,500 replacement parts manufactured by OMC, including all die cast parts and numerous other parts required by retail establishments engaged in the business of repairing Johnson and Evinrude motors. A few firms, particularly those in the business of marketing automobile replacement parts, have attempted to market some ignition and carburetor parts for Johnson and Evinrude motors, but their efforts have never posed a significant threat to OMC's market position.

The most notable attempt in this regard was made by a large manufacturer of automobile replacement parts, Echlin Manufacturing Company. In the middle 1960's Echlin acquired Sierra Supply Company, a firm that had been marketing some marine parts, and attempted to market a line of Johnson and Evinrude replacement parts, including such parts as breaker points, condensers, gaskets and O-rings. Echlin, through Sierra, endeavored to distribute this line both through marine distributors and through the vast network of NAPA automotive wholesalers and jobbers located throughout the United States. A catalog listing these parts was published, and the parts were offered at prices lower than OMC offered its "genuine" parts. Des-

pite these marketing efforts Echlin's sales of these parts have never been more than a negligible fraction of OMC's sales. Similarly, the other companies never have been able even to threaten OMC's market position in the manufacture and sale of replacement parts for Johnson and Evinrude motors.

OMC's position in the sale of replacement parts at the manufacturing level is to some extent due to the fact that more complicated parts are such that no one but the basic manufacturer could afford to make them and sell them at any kind of sensible price, because of the equipment involved and the tooling involved. Other factors have contributed to the inability of any other company to challenge OMC's dominance in the sale of replacement parts. OMC's dominance in the market for outboard motors and the consequent power it has some 6,000 marine dealers is an effective deterrent to potential competitors in the sale of replacement parts, particularly since OMC over the years, through official service bulletins and "advice" given by its service and sales organizations, has disparaged the "gyp" parts offered by other manufacturers and urged its dealers to use only "genuine OMC parts." Moreover, until October 1, 1971, each outboard motor franchise agreement issued by Johnson and Evinrude required the dealer to "maintain adequate inventory of genuine OMC Parts and Accessories to accommodate the normal service and warranty requirements in his territory." Thus, OMC's dealers in fulfilling their "normal service requirements" could substitute parts manufactured by other firms for OMC parts only if they were willing to risk the displeasure of their critical supplier and the charge of being in violation of their franchise agreements with that supplier.

It is difficult or impossible to engage in the business of repairing Johnson or Evinrude outboard motors without

access to replacement parts manufactured by OMC. It would not be practical for anyone to maintain a business of outboard motor repair in the United States without access to replacement parts manufactured by OMC.

Persons other than Johnson dealers and Evinrude dealers, such as independent marine repair shops, marinas, yacht houses and dealers in outboard motors manufactured by persons other than OMC, also are engaged in the business of repairing and servicing outboard motors. Such other persons compete and have competed with Johnson dealers and Evinrude dealers in repairing and servicing outboard motors. Such other persons require, and for many years past have required, a supply of parts to repair and service outboard motors manufactured by OMC. It is, and for many years past has been, impossible to engage in the business of repairing Johnson or Evinrude outboard motors without access to parts manufactured by OMC.

Retail marine dealers unable to perform repair work on Johnson and Evinrude outboard motors would lose substantial numbers of potential customers for marine products offered by them, such as boats, accessory items and outboard motors manufactured by firms other than OMC. Retail marine dealers unable to perform repair work on Johnson and Evinrude outboard motors would lose substantial repair business.

Replacement parts and accessories for outboard motors manufactured by OMC are, and for many years past have been, distributed through independent wholesale parts distributors. Independent wholesale parts distributors purchase and have purchased such replacement parts and accessories from OMC. Independent wholesale parts distributors sell and have sold replacement parts and accessories to retail dealers, including Johnson dealers and Evinrude dealers, and other establishments in the business

of repairing and servicing outboard motors. Independent wholesale parts distributors sell and have sold such parts and accessories to such retail dealers in competition with OMC since 1967. In addition to OMC parts and accessories, independent wholesale parts distributors also sell and have sold parts and accessories manufactured by companies other than OMC to retail dealers, including Johnson and Evinrude dealers.

Replacement parts for outboard motors constitute a relevant product market. And replacement parts for Johnson and Evinrude outboard motors constitute a relevant product submarket. The United States as a whole constitutes a relevant geographic market and the United States east of the Rockies area constitutes a relevant geographic submarket for each of said product markets and submarkets.

OMC is the dominant manufacturer, distributor and seller of replacement parts for outboard motors and OMC has monopoly power in the manufacture, distribution and sale of replacement parts for Johnson and Evinrude outboard motors in both the United States as a whole and in the United States east of the Rockies area.

On or about May 7, 1971, OMC publicly announced a program under which it would cease to sell OMC replacement parts and accessories to independent wholesale distributors and would establish its own wholesale distribution for replacement parts and accessories in the United States east of the Rockies area. OMC sent a letter on or about May 7, 1971, to all fourteen (14) independent wholesale distributors in the United States east of the Rockies area, stating to each distributor that it would not enter into an agreement with that distributor for any term extending beyond a certain date set forth in that letter.

OMC intends and has communicated to the aforesaid independent wholesale distributors and others that it intends

to permanently cease selling replacement parts and accessories to each of the aforesaid independent wholesale distributors and to replace them with parts depots owned or controlled by OMC.

On or about November 19, 1976, OMC publicly announced that as of September 30, 1978, it would as a policy concerning replacement parts and accessories distribution in the United States east of the Rockies area (1) terminate all existing independent wholesale distributorships; (2) require all existing independent wholesale distributors to sell to OMC all new saleable OMC products including replacement parts and accessories; and (3) in addition to the presently OMC owned and controlled wholesale distribution of OMC products including replacement parts and accessories (OMC Distributors, Inc. - Ft. Wayne OMC Distributors, Inc. - Waukegan, OMC Distributors, Inc. - Minneapolis and OMC Distributors - Miami) would create additional OMC owned and controlled wholesale distributors of OMC products including replacement parts and accessories in Atlanta, Georgia; Dallas, Texas; the New York-New Jersey Metropolitan Area; and either Kansas City or Springfield, Missouri.

In 1965, OMC purchased an independent distributorship of replacement parts and accessories in San Francisco and established a company-owned distributorship in the same location to serve Northern California. In 1966, OMC terminated the distributorship of Santana Marine Distributing Co., an independent distributor in Miami that served most of the State of Florida. It was replaced by the establishment of a company-owned depot in Miami. It was part of the plan of OMC's management to take over the distribution market of replacement parts and accessories in the United States east of the Rockies area.

In the summer of 1968, OMC decided to terminate two independent distributorships in the Midwest—Triangle Boat & Motors, Inc., in Detroit, and Cleveland Yacht & Supply Co., in Cleveland. In August, 1968, Howard F. Larson, OMC's Vice President for marine marketing, visited Donald H. Bullock, President of Bullock's, in South Bend, Indiana and advised him that OMC wished to purchase the business of Bullock and employ Bullock's management to operate a company-owned distributor to serve the territory previously served by the three independent distributors—Bullock, Triange and Cleveland Yacht. When Bullock rejected this offer, Mr. Larson formally notified Bullock that its distributorship would be terminated as of September 30, 1969.

The termination of Bullock was not merely an isolated decision by OMC to cease dealing with one customer. It was instead part of a plan under which OMC would replace all independent distributors of replacement parts and accessories with distributorships owned and controlled by OMC.

The business of distributing OMC marine parts and accessories had, since OMC's inception, been carried on by independent wholesale distributors. Sometime before the decision to terminate Bullock, however, Mr. Larson, together with William C. Scott, OMC's President, and Harold L. Bourdon, the Vice President and Division Manager of OMC's Gale Products Division, concluded that OMC should take over this distribution market. Their plan, which was to be implemented as individual opportunities arose rather than pursuant to a fixed timetable, was intended ultimately to obtain for OMC nationwide control of the distribution of replacement parts for Johnson and Evinrude motors.

Bullock Marine Distributing Company, Inc. (herein sometimes "Bullock") was for nineteen (19) years engaged

in the wholesale distribution of marine parts and accessories supplied by defendant OMC.

On October 1, 1969, Bullock was replaced as a distributor of OMC marine parts and accessories by defendant OMC Parts Depot—Ft. Wayne, Inc. (hereinafter "OMC-Ft. Wayne"), a wholly-owned subsidiary of OMC.

OMC-Ft. Wayne was formed as a wholly owned subsidiary of OMC in the Spring of 1969 to replace Bullock as a distributor of OMC parts and accessories in the Midwest. Since October 1, 1969, OMC-Ft. Wayne has distributed these products from its place of business in Fort Wayne, Indiana, to marine dealers located in substantially the same geographical area as Bullock previously served.

One option open to OMC in 1968, but clearly not in accordance with its plans, would have been to establish a company-owned distributor to replace Triangle and Cleveland Yacht and allow Bullock to remain in business as a competitor to this company-owned distributor. OMC had no indication that a company-owned distributor would be more effective or efficient than Bullock, but it did not want to leave Bullock in a position to continue serving the marine dealers in the same territory OMC-Ft. Wayne was intended to serve.

Subsequent to the termination of Bullock, OMC continued to implement its plans to take control of the parts business. In 1970, it purchased the business of H & S Distributors, an independent distributor in Waukegan and established a company-owned depot in Waukegan, and in April of 1971, a formal schedule to replace virtually all the remaining independent distributors was presented to the Executive Committee. Even though this presentation contemplated the termination of OMC's relationships with companies that for many years had satisfactorily performed

an essential parts distribution function, the Committee ratified the schedule presented with little discussion and no opposition.

On May 7, 1971, there were fourteen (14) independent wholesale distributors of replacement parts in the United States east of the Rockies area. As a result of the actions of defendant, seven (7) of these have ceased to operate as of the date of the filing of this complaint.

The seven (7) independent wholesale distributors and their last year of operation were:

Star Boat & Motor Company, Kansas City, Missouri
- 1971

Outboard Parts Service, Memphis, Tennessee - 1971

Inland Marine, Minneapolis, Minnesota - 1973

Larson-Olsen, Minneapolis, Minnesota - 1973

Doc Chavin, Boston, Massachusetts - 1974

C. B. Delhomne, Houston, Texas - 1976

Higgins Marine, New Orleans, Louisiana - 1976

The seven (7) wholesale distributors presently operating are:

Outboard Motor Parts, Inc., Paramus, New Jersey

Covert Marine, Inc., Kansas City, Missouri

Crandall-Hicks Company, Inc., Southboro, Massachusetts

Eastern Outboard Parts Corporation, Fairfield, New Jersey

Griffin's Outboard Marine, Inc., Atlanta, Georgia

Loe Marine Supply Company, Shreveport, Louisiana

Pyron & Garrow Parts Depot, Inc., Atlanta, Georgia

There are approximately 18,500 replacement parts for Johnson and Evinrude outboard motors. Defendant is the only manufacturer, distributor and seller of approximately 18,000 of said replacement parts. Other manufacturers manufacture, distribute and sell approximately 500 of said replacement parts in competition with defendant. It is and would be impractical for manufacturers of replacement parts for Johnson and Evinrude outboard motors to compete with defendant except through an independent wholesale distribution system for distributing and selling replacement parts for Johnson and Evinrude outboard motors. If defendant refuses to sell replacement parts for Johnson and Evinrude outboard motors to independent wholesale distributors, it will enable defendant to gain a competitive advantage in the manufacture, distribution and sale of replacement parts for Johnson and Evinrude motors in the United States and in the United States east of the Rockies area.

It is not and would not be practical for an independent wholesale distributor of replacement parts to carry a line of replacement parts for Johnson and Evinrude outboard motors without access to those parts manufactured, distributed and sold by defendant.

It is not and would not be practical for a retail dealer requiring replacement parts for Johnson and Evinrude outboard motors to deal with an independent wholesale distributor who did not have access to those parts manufactured, distributed and sold by defendant.

Maintenance of present competition in and access to future competition in the manufacture, distribution and sale of replacement parts for Johnson and Evinrude outboard motors requires the continuation of a viable and competitive distribution system by independent wholesale distributors in the United States east of the Rockies area.

In addition to marketing outboard motors and replacement parts for these motors, marine dealers typically sell other marine products including a wide range of marine accessories, such as anchors, life-jackets and flotation vests, water-skis, gas tanks, propellers, marine instruments, and a host of other products used by boaters. OMC's management long has recognized the favorable impact that their control of the distribution of replacement parts for Johnson and Evinrude motors could have on the corporation's sales of these accessories. During the 1960's OMC's management had a growing interest in expanding the company's line of marine accessories, a national market presently in excess of \$800,000,000 annually.

The most obvious way in which control of replacement parts distribution contributes to the sale of marine accessories is that the parts can be used as "bait" for the sale of accessories. Marine dealers find it considerably more convenient to order both their parts and accessories from a single source.

The advantage of being able to offer marine accessories along with replacement parts is, of course, an advantage possessed by independent as well as company-owned distributors of replacement parts. No independent distributor, however, can make itself the exclusive wholesale source of replacement parts for Johnson and Evinrude motors as OMC plans to make itself, and no independent distributor has the additional leverage OMC has as the dealer's direct supplier both of outboard motors and of the parts which constitute a critical component of the dealer's repair business. Under these circumstances, OMC's power to "persuade" dealers to purchase accessories from its company-owned distributors goes far beyond the attractiveness of the "single source" convenience that independent distributors of OMC parts can offer to their dealers.

OMC already has exploited this advantage by expanding the accessory line handled by its company-owned distributors in 1973 to include an array of accessories purchased from sources outside OMC. In announcing this new accessory line, OMC emphasized the fact that accessories and replacement parts could be obtained from one source in a single order. If all independent wholesale distributors are eliminated, then all dealers located in those areas served by company-owned distributors must buy parts for Johnson and Evinrude outboard motors from the OMC depot, and these company-owned distributors would have an incomparable advantage over any other wholesaler of accessories.

The effectiveness of a nationwide network of OMC-owned parts distributors in promoting marine accessories also gives OMC a powerful weapon in bargaining with outside suppliers of marine accessories for the terms upon which these suppliers will sell their products for distribution by OMC. Once OMC becomes, as it plans to become, the exclusive wholesale source of replacement parts for Johnson and Evinrude motors with a nation-wide system of marine distributors under its direct control, it will be by far the largest single purchaser of marine accessories in the United States. Under these circumstances, few accessory manufacturers will be able to avoid dealing with OMC on the terms OMC chooses to impose.

OMC has the power to exclude competition in the wholesale distribution and sale of products for use as replacement parts in Johnson and Evinrude outboard motors and OMC plans to exercise that power and vest in OMC exclusive control of the distribution of these products.

The manufacture and distribution of replacement parts for Johnson and Evinrude motors is a substantial industry, principally because of the millions of motors in use that

require these parts for normal servicing and repairs. Moreover, because of OMC's long-standing dominance of the outboard motor industry, the distribution of replacement parts for Johnson and Evinrude motors is itself an industry of strategic importance not only to OMC, but to all manufacturers of marine products. Its importance arises primarily from the fact that all of OMC's 6,000 franchised outboard dealers, as well as many other retail establishments in the marine industry, must have a supply of these parts in order to perform the outboard service and repair work brought to them by their customers.

No firm ever has held a dominant position in the wholesale market for Johnson or Evinrude parts. The marine retailers and the public have been served by a competitive wholesale market in which a number of independent distributors participated. Under this free market system, the dealers not only have been served efficiently, they also have had some leeway to select the distributor or distributors with whom they wished to deal.

OMC's termination of all independent distributorships will destroy this competitive market in that part of the United States east of the Rockies and throughout the United States.

CO-CONSPIRATORS

Other persons not made defendants herein have participated as co-conspirators and participants with the defendant in the illegal acts and transactions set forth in this Complaint. The identity of such co-conspirators and participants includes OMC Distributors, Inc., Ft. Wayne; OMC Distributors, Inc., Waukegan; OMC Distributors, Inc., Minneapolis; Outboard Marine International, Inc., Miami; and OMC Distributors, Inc., Miami and others whose identity is presently unknown to plaintiffs.

AUTHORIZATION OF ACTS AND STATEMENTS

The acts alleged in this Complaint to have been done by defendant, co-conspirators and participants were authorized, ordered or done by the officers, agents, employees or representatives of such defendant, co-conspirator, or participant while actively engaged in the management, direction or control of its or his affairs.

OFFENSE CHARGED

Beginning prior to May 7, 1971, the exact date being presently unknown to plaintiffs, and continuing up to and including the date of this Complaint, the defendant, the co-conspirators, participants and other persons to the plaintiffs unknown have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in replacement parts for Johnson and Evinrude outboard motors in the United States east of the Rockies area in violation of Sections 1 and 2 of the Sherman Act. Such offense is continuing and will continue unless relief hereinafter prayed for is granted.

The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendant, co-conspirators, participants, and other persons to the plaintiffs unknown, the substantial terms of which have been with respect to the purchase for resale of replacement parts for Johnson and Evinrude outboard motors in the United States east of the Rockies area, they agreed:

That the defendant having a dominant position in interstate trade and commerce in the manufacture, distribution and sale of replacement parts for all outboard motors and monopoly power in interstate trade and commerce in the manufacture, distribution and sale of replacement parts

for Johnson and Evinrude outboard motors in the United States and in the United States east of the Rockies area would extend said dominant position and said monopoly power into the interstate trade and commerce of the wholesale distribution and sale of replacement parts for Johnson and Evinrude outboard motors in the United States east of the Rockies area for the purpose and with the effect of foreclosing competition in the wholesale distribution and sale of replacement parts for Johnson and Evinrude outboard motors and to gain a competitive advantage in the manufacture, distribution and sale of replacement parts for Johnson and Evinrude outboard motors and marine accessories in the United States east of the Rockies area all as herein described and in furtherance thereof to unreasonably restrain interstate trade and commerce of replacement parts for Johnson and Evinrude outboard motors in the United States east of the Rockies area by the following means, among others which are presently unknown to plaintiffs:

A. By establishing defendant owned and controlled wholesale distribution outlets of replacement parts for Johnson and Evinrude outboard motors and marine accessories in the United States east of the Rockies area;

B. By purchasing all replacement parts for Johnson and Evinrude outboard motors at the wholesale distribution level in the United States east of the Rockies area;

C. By terminating all presently existing independent wholesale distributors of replacement parts for Johnson and Evinrude outboard motors in the United States east of the Rockies area;

D. By refusing to sell replacement parts for Johnson and Evinrude outboard motors to independent wholesale distributors in the United States east of the Rockies area.

E. By entering into agreements with independent wholesale distributors of replacement parts for Johnson and Evinrude outboard motors that defendant would not compete with said independent wholesale distributors in the wholesale distribution and sale of replacement parts for Johnson and Evinrude outboard motors to retail dealers in specified geographic areas in the United States east of the Rockies area up to the date of September 30, 1978 on condition that OMC parts and accessory distribution agreements between defendant and independent wholesale distributors would terminate on September 30, 1978.

In effectuating and carrying out the aforesaid combination and conspiracy, the defendant co-conspirators and participants have done those things hereinbefore charged, they combined, conspired and agreed to do.

EFFECTS OF THE CONSPIRACY

The effects of the combination and conspiracy alleged in this Complaint upon the hereinbefore described interstate trade and commerce have been:

To deprive ultimate consumers and retail dealers of replacement parts for Johnson and Evinrude outboard motors in the United States east of the Rockies area of an independent wholesale distribution system thereby eliminating competition for said replacement parts.

To give defendant power to control the over-all operations of retail dealers purchasing replacement parts for Johnson and Evinrude outboard motors in the United States east of the Rockies area, thereby enhancing defendant's dominant position in the outboard motor industry.

To give defendant a competitive advantage in the manufacture, distribution and sale of marine accessories in the United States east of the Rockies area.

To give defendant a competitive advantage in the manufacture, distribution and sale of replacement parts for Johnson and Evinrude outboard motors in the United States east of the Rockies area.

To give defendant a competitive advantage in the manufacture, distribution and sale of outboard motors.

ACTS IN FURTHERANCE OF CONSPIRACY

During the period of time covered by this Complaint, defendant, co-conspirators, participants and other persons to the plaintiffs unknown, for the purpose of forming and effectuating the aforesaid combination and conspiracy and in furtherance thereof, have done, among other things, the following:

A. On or about November 19, 1976, defendant announced in a letter to dealers (Exhibit 1) that as of September 30, 1978:

1. It would cease to supply replacement parts and accessories to independent wholesale distributors in the United States east of the Rockies area.

2. In addition to four company distribution outlets of replacement parts and accessories in Ft. Wayne, Indiana, Waukegan, Illinois, Minneapolis, Minnesota and Miami, Florida now serving various parts of the United States east of the Rockies area, four additional company distribution outlets would become operational in Atlanta, Georgia; Dallas, Texas; New York - New Jersey metropolitan area; and Kansas City - Springfield, Missouri area.

3. All new saleable OMC products, replacement parts and accessories, will be purchased from all independent wholesale distributors in the United States east of the Rockies area.

A true copy of Exhibit 1, referred to in paragraph A hereof, is attached to the Complaint and is hereby incorporated by reference.

Continuously since at least May 7, 1971, the exact date being unknown to plaintiffs, defendant has caused replacement parts for Johnson and Evinrude outboard motors to be shipped from states other than the State of Missouri to wholesale distributors and retail dealers in the State of Missouri, said replacement parts being the subject of said combination, conspiracy, contracts, conditions, agreements, understandings and concert of action, as hereinabove set forth.

INJURY TO PLAINTIFFS

By reason of the unlawful conduct alleged above, and as a direct and proximate result thereof, plaintiffs have been and will be injured in their business and property in that they have and will lose profit, good will, reputation and prestige by reason of the destruction by defendant of the competitive market in Johnson and Evinrude outboard motor replacement parts at the wholesale distribution level in that part of the United States east of the Rockies area.

As a direct and proximate result of defendant's unlawful conduct, plaintiffs have sustained and will sustain damages but which are presently undetermined and which cannot be determined with precision until plaintiffs have had adequate discovery of defendant's, co-conspirators' and participants' books and records.

The unlawful conduct of defendant, co-conspirators and participants alleged herein is continuing and unless restrained by order of this Court will cause irreparable injury and continuing damage and loss to plaintiffs.

WHEREFORE, plaintiffs, on their own behalf and as representative of the class herein described, pray:

Judgment against defendant and in favor of plaintiffs in threefold the damages determined to have been sustained by plaintiffs, together with the costs of suit, including a reasonable attorney's fee.

That defendant be permanently enjoined from refusing to sell replacement parts to independent wholesale distributors in the United States east of the Rockies area.

That the defendant be permanently enjoined from purchasing inventories of replacements parts from independent wholesale distributors in the United States east of the Rockies area.

That the Court enter a Declaratory Judgment declaring that the defendant is obligated to sell replacement parts to independent wholesale distributors in the United States east of the Rockies area and that any agreements to the contrary are illegal, invalid and unenforceable and are therefore not binding upon the parties thereto.

Plaintiffs respectfully request that trial on this prayer for Declaratory Judgment be advanced on the Court's calendar pursuant to Rule 57, Federal Rules of Civil Procedure.

That this action be designated and authorized to proceed as a class action pursuant to Rule 23, Federal Rules of Civil Procedure.

That representative plaintiffs and the class herein described have such other and further relief as the Court may deem just and proper under the premises.

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JURY DEMAND

Please take notice that plaintiffs demand a trial by jury, pursuant to Rule 38(b), Federal Rules of Civil Procedure, of all issues herein.

Sheridan Morgan

APPENDIX 5

FINAL JUDGMENT

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CIVIL ACTION NO. 71-F-104

COVERT MARINE, INC., CRANDALL-HICKS COMPANY, INC., EASTERN OUTBOARD PARTS CORPORATION, GRIFFIN'S OUTBOARD MARINE, INC., LOE MARINE SUPPLY CO., INC., and PYRON & GARROW PARTS DEPOT, INC.,

Plaintiffs,

v.

OUTBOARD MARINE CORPORATION and OMC PARTS DEPOT-FORT WAYNE, INC.,

Defendants.

Plaintiffs having filed their Complaint herein on September 21, 1971, and defendants having appeared by their counsel, and the parties having consented to the entry of this Final Judgment herein, without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or admission by any party with respect to any such issue;

NOW, THEREFORE, without any testimony having been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties, it is hereby

Ordered, Adjudged and Decreed as follows:

I.

This Court has jurisdiction of the subject matter of this action and the parties hereto.

II.

Outboard Marine Corporation for purposes of this Final Judgment shall include any subsidiary, affiliate or division of Outboard Marine Corporation and any successor to Outboard Marine Corporation.

III.

The term of the OMC Parts and Accessories Distributor Agreement between each plaintiff and defendant Outboard Marine Corporation, a copy of which is attached hereto, shall be extended to September 30, 1978, and any provision therein for earlier expiration or termination without cause is hereby cancelled, and each such Agreement shall thereupon terminate and be of no further force and effect and defendant Outboard Marine Corporation shall have no further obligation to deal with any plaintiff. During the term of each such Agreement the territory specified therein shall not be diminished.

IV.

Upon termination of each Agreement, Outboard Marine Corporation shall repurchase and each plaintiff shall sell to Outboard Marine Corporation, f.o.b. each plaintiff's place of business, such new saleable OMC products, parts and accessories as are covered by such Agreement as said plaintiff may have on hand at the price for which said plaintiff was billed therefor without deduction for reconditioning and handling expense.

V.

Until termination of the Agreement between each plaintiff and defendant Outboard Marine Corporation as provided in Article III hereof, defendant Outboard Marine Corporation shall continue to sell to said plaintiff, in good faith and on nondiscriminatory terms and conditions pursuant to the terms of said Agreement and the past course of dealings between the parties, service parts and accessories for all of the products listed in said Agreement and for other products which replace such products.

VI.

Until termination of the Agreement between each plaintiff and defendant Outboard Marine Corporation as provided in Article III hereof, said plaintiff shall continue to sell and distribute the parts and accessories offered for sale to it by defendant Outboard Marine Corporation effectively and in good faith pursuant to the terms of said Agreement and the past course of dealings between the parties.

VII.

Defendant Outboard Marine Corporation shall not, prior to the termination of its Agreement with a plaintiff, as provided in Article III hereof or as otherwise agreed between defendant Outboard Marine Corporation and said plaintiff, sell to retailers any service parts or accessories for any of the products listed in said Agreement from any place of business of defendant Outboard Marine Corporation located within the geographic area specified in said agreement.

VIII.

Except as expressly provided herein, each and every claim asserted in the Complaint is hereby dismissed with prejudice.

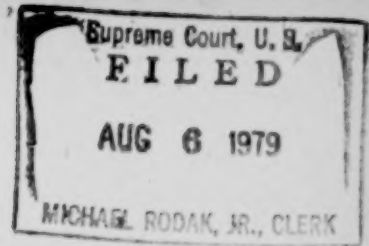
IX.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties hereto to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction of or carrying out of this Final Judgment.

/s/ Jesse E. Eschbach

United States District Court

May 23, 1972



**IN THE
SUPREME COURT
OF THE
UNITED STATES**

OCTOBER TERM, 1979

No. 79-37

COVERT MARINE, INC. et al.,
Petitioners,

-VS-

OUTBOARD MARINE CORPORATION,
Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTION PRESENTED

Respondent believes that the proper question presented by the Petition, of necessity because of the posture of the suit, is:

Did the Seventh Circuit Court of Appeals properly find that the District Court had not abused its discretion in denying the Petitioner-Wholesalers' and the Petitioner-Retailers' motion for a preliminary injunction?

STATEMENT OF THE CASE

Certain further aspects of the case should be presented.

Prior to the hearing in the District Court on the motion for preliminary injunction, Respondent filed a "Motion for Dismissal—As to All Plaintiffs—Under Doctrine of Res Judicata, Estoppel and Rule 65(d), FRCP" (herein called "Motion for Dismissal").

As to the Petitioner-Wholesalers, the basis for the Motion for Dismissal was that they had entered into a Final Judgment with Respondent approximately five years prior to the commencement of this lawsuit in an earlier antitrust case commenced by such Petitioner-Wholesalers against Respondent in the District Court involved in this lawsuit. The earlier case—*Covert Marine, Inc., et al v Outboard Marine Corporation, et al.*, Civil Action No. 71-F-104—is herein called "Covert I".

The Covert I Final Judgment provides:

"The term of the OMC Parts and Accessories Distributor Agreement between each plaintiff and defendant Outboard Marine Corporation . . . shall be extended to September 30, 1978 . . . and each such Agreement shall thereupon terminate and be of no further force and effect and defendant Outboard Marine Corporation shall have no further obligation

to deal with any plaintiff." (Article III, Final Judgment; Pet. A.63);

"Upon termination of each Agreement, Outboard Marine Corporation shall repurchase and each plaintiff shall sell to Outboard Marine Corporation . . . such new saleable OMC products, parts and accessories as are covered by such Agreement as said plaintiff may have on hand . . ." (Article IV, Final Judgment; Pet. A.63);

"Except as expressly provided herein, each and every claim asserted in the Complaint is hereby dismissed with prejudice." (Article VIII, Final Judgment; Pet. A.64).

On July 30, 1979 the Motion for Dismissal was granted by the District Court as to Petitioner-Wholesalers.

With respect to Petitioners' claim in the lower courts and in its Petition herein that Respondent is violating Sections 1 and 2 of the Sherman Act by seeking a competitive advantage in the sale of marine accessories to marine retail dealers, Respondent pointed out to both the District Court and the Court of Appeals that Paragraph 42 of the Covert I complaint alleged that Respondent violated Section 2 of the Sherman Act by attempting to monopolize and monopolizing:

"(f) The distribution of accessories manufactured by defendant for use with its marine engines;

(g) the distribution of accessories designed for use with marine engines manufactured by defendant;

(h) the distribution of accessories designed for use with all marine engines;

* * *

(k) the manufacturing and sale of accessories designed for use with marine engines manufactured by defendant;

(l) the manufacturing and sale of accessories designed for use with all marine engines."

It was also pointed out that Paragraph 47 of the Covert I complaint alleged a conspiracy to restrain and monopolize those parts of trade and commerce set forth in paragraph 42(f)-(h), (k) and (l) of the complaint, in violation of Sections 1 and 2 of the Sherman Act. The District Court found that Covert I involved the distribution of marine accessories (Pet. A. 15).

Respondent also noted to the Court of Appeals, by quoting an excerpt from Petitioner-Wholesalers' preliminary injunction brief in Covert I, that the claim of competitive advantage as to marine accessories was presented in Covert I.

Further the District Court determined that Respondent has not pressured and cannot pressure its dealers with respect to the purchase of marine accessories (Pet. A.10-12); that Respondent's share of the accessories market is only 2.6% (Pet. A.12); that any attempt by Respondent to force its dealers to buy marine accessories from Respondent would be defeated because the dealers would likely switch to competitive outboard brands (Pet. A.10 & 11); and that the marine accessories market is "highly competitive" and dealers would continue to buy as they do now, shopping for the best prices, terms and services (Pet. A.12).

The District Court found that there was no evidence of immediate and irreparable injury to Petitioner-Retailers (Pet. A.13) and that Petitioner-Retailers failed to show they have no adequate remedy at law (Pet. A.14). As to the Petitioner-Wholesalers, the District Court found that they had no likelihood of success on the merits and were not irreparably harmed primarily because they are bound by the Final Judgment which was entered in Covert I (Pet. A.14-21).

The Court of Appeals upheld the District Court, stating that the findings of the District Court were not clearly

erroneous and that the District Court had not committed an abuse of discretion (Pet. A.2). The Court of Appeals also noted that there was a likelihood the Petitioner-Wholesalers would be barred by res judicata and that the Petitioner-Retailers had failed to demonstrate either irreparable harm or likelihood of success on the merits (Pet. A.2).

In ending, certain significant misstatements in the Petition should be noted. The Petition at several places asserts that Respondent has monopoly power in its outboard motor parts. The record not only fails to establish this assertion, but disproves it. Petitioners also overstate Respondent's market position in outboard motors. That position, as shown by the record, is currently about 50%. Lastly, the Petition claims that all 12,000 marine dealers need Respondent's outboard motor parts to be viable. According to the record, this is true only with respect to Respondent's Johnson and Evinrude dealers. They now number approximately 5,000.

ARGUMENT

Lack of Jurisdiction

The Petition seeks review of the denial by the lower courts of Petitioners' motion for preliminary injunction. Petitioners have not demonstrated in their Petition any special and important reason why the decisions below should be reviewed by this Court, as required by Rule 19 of the Supreme Court Rules. Indeed, it is difficult to conceive of a case more extreme than this one wherein the criteria of Rule 19 have not been met.

The prerequisites for issuance of a preliminary injunction and the rule that the burden of proof is on the moving party were discussed in *Fox Valley Harvestore, Inc. v A. O. Smith Harvestore Products, Inc.*, 545 F2d 1096 (7th Cir 1976) at 1097. The Seventh Circuit said:

"The grant of a preliminary injunction is the exercise of an extremely far reaching power not to be indulged

in except in a case clearly warranting it. . . . The discretion exercised by the district court is measured against several prerequisites: (1) the plaintiffs have no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (2) the threatened injury to the plaintiffs outweighs the threatened harm the injunction may inflict on the defendant; (3) the plaintiffs have at least a reasonable likelihood of success on the merits; and (4) the granting of a preliminary injunction will not disserve the public interest. . . . A preliminary injunction is an extraordinary remedy which is not available unless the plaintiffs carry their burden on persuasion as to all of the prerequisites."

Petitioners' sole contention is that the Court of Appeals decision that Petitioner-Wholesalers are not entitled to a preliminary injunction "because of the likelihood that [they] will be barred by res judicata" is in conflict with *Lawlor v National Screen Services Corporation*, 349 US 322, 99 LEd 1122, 75 S Ct 865 (1955). Assuming arguendo that such contention is correct, the fact remains that there are other reasons for upholding the decisions below.

Petitioners claim that Respondent is violating Sections 1 and 2 of the Sherman Act because Respondent will gain a competitive advantage in the sale of marine accessories to marine dealers by becoming the only distributor of its outboard motor parts in the United States east of the Rocky Mountains. The District Court, however, found that there was no likelihood of success on the merits of that claim. Specifically, the District Court found that Respondent cannot and will not coerce, either expressly or impliedly, its dealers in the purchase of any marine accessories (Pet. A.10-14). Patently, that finding applies to both the Petitioner-Wholesalers and the Petitioner-Retailers.

Petitioners have not challenged the above finding in their Petition. Clearly, the denial of the preliminary injunction stands, regardless of the *Lawlor* argument advanced by Petitioners.

Res Judicata

Petitioners read *Lawlor v National Screen Services Corporation*, 349 US 322, 99 LEd 1122, 75 S Ct 865 (1955), as holding that conduct subsequent to a judgment is excluded from the res judicata bar of that judgment.

They then assert, in effect, that Respondent's termination of the Petitioner-Wholesalers on September 30, 1978 constituted subsequent conduct within the meaning of *Lawlor*. (See pages 12 and 14 of Petitioners' Brief and, particularly, the prayers in their motion for preliminary injunction set forth at pages 6 and 7 of said Brief.) This is nonsense.

Such "subsequent conduct" was not only envisioned but also mandated in the Covert I Final Judgment. Such Judgment specifically provides that the business relationships between the Petitioner-Wholesalers and Respondent shall terminate on September 30, 1978 and, thereafter, Respondent shall have no further obligation to deal with any Petitioner-Wholesaler. Further, such Judgment requires each Petitioner-Wholesaler to sell to Respondent such new saleable products of Respondent which the Petitioner-Wholesaler has on hand on September 30, 1978. Such Judgment differs from the *Lawlor* judgment in these critical respects. In short, the terminations of which Petitioners complain were the essence of the Covert I Final Judgment and, in fact and in law, cannot be subsequent conduct within the meaning of *Lawlor*. Such terminations did not post-date the Covert I Final Judgment but rather constituted enforcement of its terms.

The contorted argument of Petitioners reveals this suit as but an attack on, and an attempt to nullify and void, the Covert I Final Judgment.

Additionally, *Lawlor* was fully disposed of below. *Lawlor* involved new antitrust violations—deliberately slow deliveries and tie-in sales, among others—and an increase in defendants' control over the market. These were claims which did not exist and could not be sued upon at the time of

the earlier judgment. Accordingly, a new cause of action arose. After thorough analysis, the District Court found that *Lawlor* was factually distinguishable (Pet. A.18 & 19). This finding, too, is unchallenged by Petitioners. Having distinguished *Lawlor*, the District Court further found that the claim of the Petitioner-Wholesalers in this case is exactly the same claim, the same cause of action, involved in Covert I (Pet. A.19 & 20). The claim in both cases is that Respondent will gain an advantage in the sale of marine accessories by becoming the sole distributor of its parts.

Clearly, there is nothing in the decisions below which is contrary to *Lawlor*.

CONCLUSION

The Petition of Writ of Certiorari should be denied.

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